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REPORT
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CAPITAL OWNERSHIP DEVELOPMENT REFORM ACT OF 1987

NOVEMBER 25, 1987.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. LAFALCE, from the Committee on Small Business, submitted the following

REPORT

[To accompany H.R. 1807]

[Including cost estimate of the Congressional Budget Office]

The Committee on Small Business, to whom was referred the bill (H.R. 1807) to amend the Small Business Act to reform the Capital Ownership Development Program, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Capital Ownership Development Reform Act of 1987".

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—The Congress finds that--

(1) the Capital Ownership Development Program administered by the Small Business Administration, and the award of contracts pursuant to section 8(a) of the Small Business Act to firms participating in such program, are intended to help socially and economically disadvantaged individuals enter the mainstream of the American economy;

(2) although some progress has resulted from the program, it has generally failed to meet its objectives, which remain as valid now as when the program was initiated;

(3) the Small Business Administration and some program participants have given insufficient attention and support to the business development goals of the program and instead has focused almost entirely on the size of contract awards or the number of firms certified to participate in the program; and

(4) it is necessary to reform substantially such program and provide for competition within the program in order to promote Congressionally mandated business development objectives and purposes of the program.

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(b) PURPOSES.—It is, therefore, the purpose of this Act to—

(1) affirm that the Capital Ownership Development Program and the section 8(a) authority shall be used exclusively for business development purposes to help small businesses owned by the socially and economically disadvantaged to compete on an equal basis in the mainstream of the American economy;

(2) affirm that the measure of success of the Capital Ownership Development Program, and the section 8(a) authority, shall be the number of competitive firms that exit the program, without being unreasonably reliant on section 8(a) contracts, and that are able to compete on an equal basis in the mainstream of the American economy; and

(3) insure that program benefits accrue to individuals who are both socially and economically disadvantaged.

SEC. 3. BUSINESS DEVELOPMENT OBJECTIVES.

(a) TECHNICAL AMENDMENT.—Section 2(c)(2)(A)(v) of the Small Business Act is amended by striking "sole source".

(b) PROGRAM PURPOSES.—

(1) Section 2(c)(2)(B) of the Small Business Act is amended to read as follows:

"(B) It is, therefore, the purpose of the programs authorized by section 7(j) of ~~this~~ Act to—

"(i) foster business ownership and development by individuals in groups that own and control little productive capital; and

"(ii) promote the competitive viability of such firms in the marketplace by creating a small business and capital ownership development program to provide such available financial, technical, and management assistance as may be necessary.".

(2) Section 2(e)(2) of the Small Business Act is amended to read as follows:

"(2) It is, therefore, the purpose of section 8(a) to—

"(A) promote the business development of small business concerns owned and controlled by socially and economically disadvantaged individuals so that such concerns can compete on an equal basis in the American economy;

"(B) promote the competitive viability of such concerns in the marketplace by providing such available contract, financial, technical, and management assistance as may be necessary; and

"(C) clarify and expand the program for the procurement by the United States of articles, supplies, services, materials, and construction work from small business concerns owned by socially and economically disadvantaged individuals.".

SEC. 4. REQUIREMENTS OF THE CAPITAL OWNERSHIP DEVELOPMENT PROGRAM.

(a) BUSINESS PLANS.—Section 7(j)(10)(A)(i) of the Small Business Act is amended to read as follows:

"(i) assist small business concerns participating in the program to develop comprehensive business plans with specific business targets, objectives, and goals that are realistic and within the capability of both the program and the participating concern. Such targets, objectives, and goals shall be designed to result in a competitive small business concern by eliminating those conditions or circumstances upon which the Administration originally determined eligibility pursuant to section 8(a)(6);".

(b) TRAINING SESSIONS.—Section 7(j)(10)(A) is amended by—

(1) striking "and" at the end of clause (v);

(2) striking the period at the end of clause (vi) and by inserting in lieu thereof "; and"; and

(3) by adding the following new clause:

"(vii) conduct training sessions to assist individuals and enterprises eligible to receive contracts under section 8(a) in the development of business principles and strategies to enhance their ability to successfully compete for contracts in the marketplace.".

SEC. 5. EFFECT ON PRESENT PROGRAM PARTICIPANTS.

Section 7(j)(10) of the Small Business Act is amended by adding the following new subparagraph:—

"(D) A small business concern participating in any program or activity conducted under the authority of this paragraph or eligible for the award of contracts pursuant to section 8(a) on the effective date of this subparagraph shall be permitted continued participation and eligibility in such program or activity for a period of time which is the greater of—

"(i) Nine years less the number of years since the award of its first contract pursuant to section 8(a); or

"(ii) its original fixed program participation term (plus any extension thereof) assigned prior to the effective date of this subparagraph.

Nothing contained in this subparagraph shall be deemed to prevent the Administration from instituting a termination or graduation pursuant to subparagraph (F) or (G) for issues unrelated to the expiration of any time period limitation.".

SEC. 6. TERMINATION AND GRADUATION STANDARDS.

Section 7(j)(10) of the Small Business Act is further amended by adding the following new subparagraphs:

"(E) A small business concern participating in the program conducted under the authority of this paragraph and eligible for the award of contracts pursuant to section 8(a) shall be denied all such assistance if such concern—

"(i) voluntarily elects not to participate;

"(ii) has been a participant in the program for the nine-year time limit prescribed by paragraph (15);

"(iii) is terminated pursuant to a termination proceeding conducted in accordance with the provisions of section 8(a)(9); or

"(iv) is graduated pursuant to a graduation proceeding conducted in accordance with the provisions of section 8(a)(9).

"(F) For the purposes of this Act the terms 'terminated' or 'termination' shall mean the total denial or suspension of assistance pursuant to this paragraph or section 8(a) prior to the graduation of the participating small business concern pursuant to subparagraph (G) or the expiration of the time limitation prescribed by paragraph (15). An action for termination shall be based upon good cause, including—

"(i) the failure by such concern to maintain a standard of program eligibility;

"(ii) the violation of any legal requirement by the concern regarding prohibited actions or the reporting of data; or

"(iii) the failure or inability of the concern to engage in business practices that will promote its competitiveness within a reasonable period of time.

"(G) For the purposes of this Act the term 'graduated' or 'graduation' shall mean the removal of a concern from the program and denial of contracts pursuant to section 8(a) due to such concern's substantial achievement of the targets, objectives, and goals contained in the concern's business plan and its demonstrated ability to compete in the marketplace without assistance under this paragraph or section 8(a).".

SEC. 7. STAGES OF PROGRAM PARTICIPATION.

Section 7(j) of the Small Business Act is amended by adding at the end thereof the following new paragraphs:

"(12) The Administration shall segment the Capital Ownership Development Program into three stages: a developmental stage; a transitional stage; and a mainstreaming stage. The developmental stage of program participation shall be designed to assist the concern to overcome its economic disadvantage by providing such assistance as may be necessary and appropriate to access its markets and to strengthen its financial and managerial skills. A small business concern in the developmental stage of program participation, if otherwise eligible, shall be qualified to receive the following assistance:

"(A) The award of contracts pursuant to section 8(a).

"(B) A maximum of two exemptions from the requirements of section 1(a) of the Act entitled 'An Act providing conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes', approved June 30, 1936 (49 Stat. 2036), which exemptions shall apply only to contracts awarded pursuant to section 8(a) and shall only be used to allow for contingent agreements by a small concern to acquire the machinery, equipment, facilities or labor needed to perform such contracts.

"(C) A maximum of two exemptions from the requirements of the Act entitled 'An Act requiring contracts for the construction, alteration and repair of any public building or public work of the United States to be accompanied by a performance bond protecting the United States and by additional bond for the protection of persons furnished material and labor for the construction, alteration, or repair of said public buildings or public works', approved August 24, 1935 (49 Stat. 793), which exemptions shall apply only to contracts awarded pursuant to

section 8(a) of this Act, except that, such exemptions may be granted under this subparagraph only if—

"(i) the Administration takes such measures as it deems appropriate for the protection of persons furnishing materials and labor to such concern;

"(ii) the Administration assists, insofar as practicable, such concern to develop, within a reasonable period of time, its ability to obtain such bonds as the Administration may subsequently require for the successful completion of the program conducted under the authority of paragraph (10); and

"(iii) the Administration finds that such concern is unable to obtain the requisite bond or bonds from a surety and that no surety is willing to issue a bond subject to the guarantee provisions of title IV of the Small Business Investment Act of 1958.

"(D) The transfer of technology or surplus property owned by the United States to such a concern. Activities designed to effect such transfer shall be developed in cooperation with the heads of Federal agencies and shall include the transfer by grant, license, or sale of such technology or property to such a concern without regard to any other provision of law. Such technology or property shall be used by the concern during the normal conduct of its business operations and shall not be sold or transferred to any other party (other than the Government) during such concern's term of participation in the program and for one year thereafter.

"(E) Financial assistance whereby the Administration may purchase in whole or in part, and on behalf of such concerns, skills training or upgrading for employees or potential employees of such concerns. Such financial assistance may be made without regard to section 18(a) of this Act, shall be made by way of reimbursement to the training provider, and shall have such adjustments as may be necessary to provide for overpayments or underpayments. For purposes of this subparagraph the term 'training provider' shall mean an institution of higher education, a community or vocational college or an institution eligible to provide skills training or upgrading under the Job Training Partnership Act. The Administration shall, in consultation with the Secretary of Labor, promulgate rules and regulations to implement this subparagraph that establish acceptable training and upgrading performance standards and provide for such monitoring or audit requirements as may be necessary to ensure the integrity of the training effort. No financial assistance shall be granted under this subparagraph unless the Administrator determines that—

"(i) such concern has documented that it has first explored the use of existing cost-free or cost-subsidized training programs offered by public and private sector agencies working with programs of employment and training and economic development;

"(ii) no more than five employees or potential employees of such concern are recipients of any benefits under this subparagraph at any one time;

"(iii) no more than $2,500 shall be made available for any one employee or potential employee;

"(iv) the length of training or upgrading financed by this subparagraph shall be no less than one month nor more than six months;

"(v) such concern has given adequate assurance it will employ the trainee or upgraded employee for at least six months after the training or upgrading financed by this subparagraph has been completed and each trainee or upgraded employee has provided a similar assurance to remain within the employ of such concern for such period; if such concern, trainee, or upgraded employee breaches this agreement, the Administration shall be entitled to and shall make diligent effort to obtain from the violating party the repayment of all funds expended on behalf of the violating party; such repayment shall be made to the Administration together with such interest and costs of collection as may be reasonable; the violating party shall be barred from receiving any further assistance under this subparagraph;

"(vi) the training to be financed may take place either at such concern's facilities or at those of the training provider; and

"(vii) such concern will maintain such records as the Administration deems appropriate to ensure that the provisions of this subparagraph and any other applicable law have not been violated.

"(13) The transitional stage of program participation shall be designed to overcome, insofar as practicable, the remaining elements of economic disadvantage and to prepare such concern for graduation from the program. A small business concern in the transitional stage of program participation, if otherwise eligible, shall be qualified to receive assistance pursuant to this paragraph and subparagraph (D) of

paragraph (12). In addition to the assistance described in the preceding sentence, a small business concern in this stage of program participation shall be eligible to receive contracts pursuant to section 8(a).

"(A) The Administration shall not, except as otherwise specifically provided for in this Act, provide any grant to any concern participating in the program established by paragraph (10) for the purposes of capital equipment acquisition, price differentials, capital improvements or any other purpose.

"(B) The Administration is empowered to make loans either directly or in cooperation with banks or other financial institutions through agreements to participate on an immediate or deferred (guaranteed) basis to small business concerns eligible for assistance under this paragraph or paragraph (14). Such assistance may be provided only if the Administration determines that—

"(i) the type and amount of such assistance requested by such concern is not otherwise available on reasonable terms from other sources;

"(ii) with such assistance such concern has a reasonable prospect for operating soundly and profitably within a reasonable period of time;

"(iii) the proceeds of such assistance will be used within a reasonable time for plant construction, conversion, or expansion, including the acquisition of equipment, facilities, machinery, supplies, or material; or to supply such concern with working capital to be used in the manufacture of articles, equipment, supplies, or materials for defense or civilian production or as may be necessary to insure a well-balanced national economy; and

"(iv) such assistance is of such sound value as reasonably to assure that the terms under which it is provided will not be breached by the small business concern.

"(C)(i) No loan shall be made under this paragraph if the total amount outstanding and committed (by participation or otherwise) to the borrower from the fund established pursuant to (E) would exceed $500,000.

"(ii) Subject to the provisions of clause (i), in agreements to participate in loans on a deferred (guaranteed) basis, such participation by the Administration shall be not less than 85 per centum of the balance of the financing outstanding at the time of disbursement.

"(iii) The rate of interest on financings made on a deferred (guaranteed) basis shall be legal and reasonable.

"(iv) Financings made pursuant to this paragraph shall be subject to the following limitations:

"(I) No immediate participation may be purchased unless it is shown that a deferred participation is not available.

"(II) No direct financing may be made unless it is shown that a participation loan is unavailable.

"(D) A direct loan or the Administration's share of an immediate participation loan made pursuant to this paragraph shall be any secured debt instrument—

"(i) that is subordinated by its terms to all other borrowings of the issuer;

"(ii) the rate of interest on which shall not exceed the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the average maturities of such loan and adjusted to the nearest one-eighth of 1 per centum;

"(iii) the term of which is not more than twenty-five years; and

"(iv) the principal on which is amortized at such rate as may be deemed appropriate by the Administration, and the interest on which is payable not less often than annually.

"(E) There is hereby established within the Treasury a revolving fund that shall be available to the Administration, without fiscal year limitation, for financing functions performed pursuant to this paragraph. All amounts received by the Administration due to loans made or participated in on an immediate or deferred (guaranteed) basis under this paragraph shall be deposited in the fund. All expenses, including administrative expenses, resulting from making or disposing of such loans by the Administration shall be paid from the fund.

"(F) There are hereby authorized to be appropriated to the fund established by subparagraph (E) such sums as may be necessary for carrying out the provisions and purposes of this paragraph relating to the making and servicing of direct, immediate participation, and guaranteed loans authorized by this paragraph. Unobligated funds previously appropriated for business development expense shall be transferred into the fund established by subparagraph (E).

"(G) The Administrator may, after consultation with the Attorney General and the chairman of the Federal Trade Commission, and with the prior written

approval of the Attorney General, approve any agreement between a small business concern eligible for assistance under this paragraph and any other business (whether or not eligible for assistance under this Act) for a joint venture between such concern and such business if the Administrator determines that such venture will enhance such concern's competitiveness and will strengthen the free enterprise system. The Administrator or the Attorney General may, at any time, withdraw approval of such agreement upon a finding that the agreement no longer carries out such purposes, except that no act or omission to act pursuant to or within the scope of such an approved agreement shall be construed to be within the prohibitions of the anti-trust laws or the Federal Trade Commission Act. All approvals and withdrawals made pursuant to this subparagraph shall be published in the Federal Register. No small business concern that enters into such a joint venture agreement shall be deemed to be other than a small business concern solely because it is a party to such agreement. Notwithstanding the provisions of this subparagraph, no joint venture formulated pursuant to this subparagraph shall be deemed eligible for the award of any contract or subcontract pursuant to sections 8(a), 8(d), 9, or section 15 if such joint venture would not have been eligible in the absence of such subparagraph. No agreement approved pursuant to this subparagraph shall be in effect for a period longer than a concern's remaining term of participation in the program, measured from the effective date of such agreement, plus an additional period of three years.

"(14) The mainstreaming stage of program participation shall be designed to incorporate a small business concern into the mainstream economy with the maximum practicable opportunity to become fully competitive. A small business concern participating in the mainstreaming stage of program participation, if otherwise eligible, shall be qualified to receive the assistance provided for by subparagraph (D) of paragraph (12) and the loan assistance established by paragraph (13). In addition to the assistance described in the preceding sentence, concerns eligible for assistance pursuant to this paragraph shall be eligible for the award of contracts pursuant to section 8(a) and such other management and technical assistance as the Administration may deem appropriate.".

SEC. 8. TIME LIMITATIONS.

Section 7(j) of the Small Business Act is further amended by adding the following new paragraph:

"(15) Notwithstanding any other provision of this Act, a small business concern shall not receive any assistance pursuant to paragraphs (10), (12), (13), or (14) or section 8(a) for a total period of longer than nine years, measured from the date of certification, of which—

"(A) no more than four years may be spent in the developmental stage of program participation established by paragraph (12);

"(B) no more than three years may be spent in the transitional stage of program participation established by paragraph (13); and

"(C) no more than two years may be spent in the mainstreaming stage of program participation established by paragraph (14).".

SEC. 9. DATA COLLECTION.

Section 7(j) of the Small Business Act is further amended by adding the following new paragraph:

"(16)(A) The Administrator shall develop and implement a process for the systematic collection of data on the benefits derived by the economy and by socially and economically disadvantaged individuals as a result of the operations of the Capital Ownership Development Program established pursuant to paragraph (10).

"(B) Not later than April 30 of each year, the Administrator shall submit a report to the Congress on the Capital Ownership Development Program that shall include the following:

"(i) The average personal net worth of individuals who own and control concerns that were initially certified for the receipt of contracts pursuant to section 8(a) during the immediately preceding fiscal year. The Administration shall also indicate the dollar distribution of net worths, at $50,000 increments, of all such individuals found to be socially and economically disadvantaged. For the first report required pursuant to this paragraph the Administration shall also provide the data specified in the preceding sentence for all eligible individuals in the program as of the effective date of this paragraph.

"(ii) A description and estimate of the benefits and costs that have accrued to the economy and the government in the immediately preceding fiscal year due to the operations of those business concerns that were performing work during

such year as the result of any contract awarded pursuant to section 8(a). Such description and estimate shall take into account, but not be limited to, the employment and total sales of such concerns and the taxes and expenditures made by such concerns during such years as well as the costs associated with conducting the program and any other related expenses.

"(iii) A compilation and evaluation of those business concerns that have exited the Capital Ownership Development Program during the immediately preceding three fiscal years. Such compilation and evaluation shall detail the number of concerns actively engaged in business operations; those that have ceased or substantially curtailed such operations, including the reasons for such actions; and those concerns that have been acquired by other firms or organizations owned and controlled by other than socially and economically disadvantaged individuals. For those businesses that have continued operations after they exited from the Capital Ownership Development Program, the Administrator shall also separately detail the benefits and costs, as described in clause (ii), that have accrued to the economy during the immediately preceding fiscal year due to the operations of such concerns.

"(iv) A listing of all participants in the Capital Ownership Development Program during the preceding year identifying, by region, for each firm: the name of the concern; the race or ethnicity, and gender of the principal owners; the dollar value of all contracts received in the preceding year; the name of the awarding agency for each such contract; the dollar amount of advance payments received by each concern; and a description including (if appropriate) an estimate of the dollar value of all benefits received pursuant to paragraphs (12), (13), and (14) during such year.

"(v) The total dollar value of contracts and options awarded during the preceding fiscal year pursuant to section 8(a) and such amount expressed as a percentage of total sales of (I) all firms participating in the Capital Ownership Development Program during such year; and (II) of firms in each of the nine years of program participation.

"(vi) A description of such additional resources or program authorities as may be required to provide the types of services needed over the next two-year period to service the expected portfolio of firms certified pursuant to section 8(a).

"(vii) The total dollar value of contracts and options awarded pursuant to section 8(a), at such dollar increments as the Administration deems appropriate, for each four digit standard industrial classification code under which such contracts and options were classified.

"(C) The first report required by subparagraph (B) shall pertain to fiscal year 1988.".

SEC. 10. CONTRACT SELECTION APPEALS AND DOCUMENTATION.

(a) APPEALS.—Section 8(a)(1)(A) is amended by inserting immediately after "fail to agree" the following: "on either the terms and conditions of such contracts or on the selection of a particular procurement requirement to be let pursuant to this subsection".

(b) DOCUMENTATION.—Section 8(a)(1) of the Small Business Act is amended by adding at the end thereof the following new subparagraph:

"(D) The contracting officer shall document the appropriate contract file with the specific reasons and supporting facts in any instance when—

"(i) such officer's agency or department fails to award a contract pursuant to subparagraph (C) after negotiations had commenced; or

"(ii) when the Administration's request that a particular contract requirement be awarded pursuant to this subsection is denied.".

SEC. 11. COMPETITIVE THRESHOLDS AND CONTRACT DISTRIBUTION.

Section 8(a)(1) of the Small Business Act is amended by adding at the end thereof the following new subparagraph:

"(E)(i) Contracts to be awarded pursuant to this subsection shall be competed among responsible small business concerns participating in the Capital Ownership Development Program established by section 7(j)(10) if there is a reasonable expectation that at least two such concerns will submit offers at fair market prices, and the proposed award will likely exceed $2,000,000 (including options) if for manufacturing, construction, services, or retail, and $1,000,000 (including options) in all other cases.

"(ii) The Administration shall ensure, to the maximum practicable extent, that—

"(I) a concern participating in the program established by section 7(j)(10) not receive a number or dollar amount of sole source contracts pursuant to this subsection that establishes an unreasonable reliance upon such contracts, pursuant to paragraph (15), to achieve such concern's business development objectives; and

"(II) there is a fair distribution of available sole source contracts so that concerns in similar circumstances are treated equitably and that no concern receive a disproportionate number of awards if other similar concerns are available to perform a share of the available work.

"(iii) The Administration and each agency participating in the competitive award of contracts pursuant to clause (i) shall develop a simplified procurement method that allows for the expedited receipt and evaluation of proposals.

"(iv) To the maximum extent practicable, the Administration shall promote the equitable geographic distribution of contracts awarded pursuant to this subsection.".

SEC. 12. FAIR MARKET PRICE.

Section 8(a)(3) of the Small Business Act is amended to read as follows:

"(3)(A) Any small business concern selected by the Administration to perform any sole-source contract to be let pursuant to this subsection shall, when practicable, participate in any negotiation of the terms and conditions of such contract.

"(B)(i) For purposes of paragraph (1)(A) a 'fair market price' shall be based on reasonable costs under normal competitive conditions.

"(ii) The estimate of a current fair market price for a new procurement requirement, or a requirement that does not have a satisfactory procurement history, shall be derived from a price or cost analysis conducted by the agency offering the requirement to the Administration. Such analysis may take into account prevailing market conditions, commercial prices for similar products or services, or data obtained from any other agency. Such analysis shall consider such cost or pricing data as may be submitted by the Administration and the small business concern selected by the Administration to perform the contract.

"(iii) The estimate of a current fair market price for a procurement requirement that has a satisfactory procurement history shall be formulated by the agency offering the requirement to the Administration and shall be based on recent award prices adjusted to insure comparability. Such adjustments shall take into account differences in quantities, performance times, plans, specifications, transportation costs, packaging and packing costs, labor and material costs, overhead costs, and any other additional costs which may be deemed appropriate.

"(C) An agency offering a procurement requirement for potential award pursuant to this subsection shall, upon the request of the Administration, promptly submit to the Administration all information, studies, analyses, and other data used by such agency to estimate the current fair market price of such requirement. Such fair market price shall not be disclosed to any potential offeror (other than the Administration) prior to or during the negotiations for the award of such requirement.

"(D) A small business concern selected by the Administration to perform or negotiate a contract to be let pursuant to this subsection shall—

"(i) be entitled, upon its request, to a written statement detailing the method used by the agency to estimate the current fair market price for such contract; and

"(ii) within such time limits as may be prescribed by the Administrator, be entitled to protest the use of such method to the Administrator if such concern has reason to believe that the provisions of this paragraph have been violated. The Administrator shall consider such protest and shall have ten days from the receipt of such protest to render a final decision; if in the discretion of the Administrator the protest is sustained, an appeal shall be filed by the Administrator pursuant to section 8(a)(1)(A); the agency that is the subject of any appeal filed pursuant to such section shall not award the contract to any other party pending the disposition of the appeal unless the contracting officer determines, in writing, that an award must be made to protect the public interest.".

SEC. 13. PROGRAM ADMISSION.

(a) ELIGIBILITY OF PARTICIPANTS.—Section 8(a)(4) of the Small Business Act is amended by adding the following new subparagraphs:

"(C) Any individual upon whom eligibility is based pursuant to this paragraph, shall be permitted to assert such eligibility for only one small business concern. Notwithstanding the provisions of the preceding sentence, no individual who was determined pursuant to this subsection to be socially and economically disadvantaged before the effective date of this subparagraph shall be permitted to assert such dis-

advantage with respect to any other concern making application for certification after such effective date.

"(D) No concern, previously eligible for the award of contracts pursuant to this subsection, shall be subsequently recertified for the award of additional contracts if its prior participation in the program was concluded for any of the reasons described in section 7(j)(10)(E).

"(E) A concern, eligible for the award of contracts pursuant to this subsection, shall remain eligible for such contracts if there is a transfer of ownership and control (as described in (A)) to individuals who would otherwise be considered socially and economically disadvantaged pursuant to this subsection. In the event of such a transfer the concern, if not terminated or graduated, shall be eligible for a period of continued participation in the program not to exceed nine years less the number of years since the award of its first contract pursuant to this subsection.".

(b) THE CERTIFICATION PROCESS.—Paragraph (8) of section 8(a) of the Small Business Act is amended to read as follows:

"(8)(A) All determinations made pursuant to paragraph (5) with respect to whether a group has been subjected to prejudice or bias shall be made by the Administrator after consultation with the Associate Administrator for Minority Small Business and Capital Ownership Development.

"(B) Applications for certification pursuant to this subsection shall be processed within ninety days after the expiration of the time period designated pursuant to subparagraph (C). The applicant shall be advised, in writing, by the Administration of the date of receipt of the concern's application and shall be entitled, upon written request, to receive from the Administration a written list of those documents or omissions that need to be submitted or corrected in order to constitute a completed application. The Administration shall comply with such request in a timely fashion.

"(C) The Administration shall designate a sixty consecutive day period during each year during which it shall accept applications for certification pursuant to this subsection. Applications may only be accepted during such designated period, unless the Administrator determines, on a case-by-case basis, that a waiver should be issued to prevent an injustice to an applicant or potential applicant for the program.

"(D) Applications received during the sixty-day period specified in subparagraph (C) shall be processed in a manner that allows the Administration to determine, insofar as practicable, the industrial and geographic distribution of applicants, their relative potential to succeed in the program, and the availability of resources and contract opportunities to service the needs of new program entrants.".

(c) OUTREACH.—Section 8(a)(10) of the Small Business Act is amended by adding at the end thereof the following: "Such program shall make a sustained and substantial effort to solicit applications for certification from small business concerns located in areas of concentrated unemployment or underemployment or within labor surplus areas.".

SEC. 14. DUE PROCESS RIGHTS.

Paragraph (9) of section 8(a) of the Small Business Act is amended to read as follows:

"(9)(A) Subject to the provisions of subparagraph (E), the Administrator, prior to taking any action described in subparagraph (B), shall provide the small business concern that is the subject of such action, an opportunity for a hearing on the record, in accordance with chapter 5 of title 5, United States Code.

"(B) The actions referred to in subparagraph (A) are—

"(i) a termination pursuant to section 7(j)(10)(F);

"(ii) a graduation pursuant to section 7(j)(10)(G); and

"(iii) the denial of a request to issue a waiver pursuant to paragraph (21)(B).

"(C) The Administrator's proposed action, in any proceeding conducted under the authority of this paragraph, shall be sustained unless it is found to be arbitrary, capricious, or contrary to law.

"(D) A decision rendered pursuant to this paragraph shall be the final decision of the Administration and shall be binding upon the Administration and those within its employ.

"(E) The adjudicator selected to preside over a proceeding conducted under the authority of this paragraph shall decline to accept jurisdiction over any matter that—

"(i) does not, on its face, allege facts that, if proven to be true, would warrant reversal or modification of the Administration's position;

"(ii) is untimely filed;

"(iii) is not filed in accordance with the rules of procedure governing such proceedings; or

"(iv) has been decided by or is the subject of an adjudication before a court of competent jurisdiction over such matters.

"(F) Proceedings conducted pursuant to the authority of this paragraph shall be completed and a decision rendered, insofar as practicable, within ninety days after a petition for a hearing is filed with the adjudicating office.".

SEC. 15. CONTRACT REQUIREMENTS.

(a) CONTRACT FORECASTS.—Section 8(a)(12) of the Small Business Act is amended by striking "contracts" and by inserting in lieu thereof "sole source and competitive contracts".

(b) RATE OF CONTRACT SUPPORT.—Section 8(a) of the Small Business Act is amended by adding at the end thereof the following new paragraph:

"(15)(A) The business plan required pursuant to section 7(j)(10) shall contain an estimated dollar support level, approved by the Administration, of all contracts to be awarded pursuant to this subsection during each year of a small business concern's participation in the program established under section 7(j)(10). Such estimated level shall be known as the section 8(a) contract support level. For each year with such a support level, such concern shall also specify the anticipated total sales it expects to make without counting awards made pursuant to this subsection. The concern shall take such measures as may be appropriate and necessary to reach a goal of 35 per centum of total sales resulting from other than contracts awarded pursuant to this subsection by the end of the fifth year of such concern's participation in the program. By the last year of the mainstreaming stage of program participation, such goal shall be 75 per centum. The goals specified in the preceding two sentences may, in the discretion of the administration, be modified for those concerns that had participated in the Capital Ownership Development Program for a period of longer than three years on the effective date of this subparagraph. Subject to the requirements of subparagraph (B), the Administration shall assist each concern participating in the program to obtain the goals established by the preceding two sentences.

"(B) The requirements referred to in subparagraph (A) are—

"(i) no award shall be made pursuant to this subsection to other than a small business concern; and

"(ii) no award shall be made pursuant to this subsection if such award would cause the small business concern to exceed its approved 8(a) contract support level for the relevant fiscal year that was established pursuant to subparagraph (A).

"(C) The support level established pursuant to subparagraph (A) shall not, for any three-year period, be set at a level that would, by itself, cause the small business concern to exceed the applicable size standard for its primary industry if it actually was awarded such a level of contracts.

"(D) When implementing the requirements of subparagraph (C) for industries with size standards based upon numbers of employees, the Administration shall ascertain from the most recently available census data the average dollar value of receipts per employee in each such industry. The multiplication of such value by the relevant size standard shall be used to measure the compliance of such industries with the requirements of subparagraph (C).".

(c) CONTRACT MATCHING.—Section 8(a) of the Small Business Act is further amended by adding at the end thereof the following new paragraph:

"(16) If a contract requirement is offered to the Administration for potential award pursuant to this subsection and the agency offering such requirement nominates an eligible small business concern to perform such contract, or if an eligible small business concern first identifies a contract requirement and causes the agency to offer such requirement to the Administration for award pursuant to this subsection, the Administration shall, in either event, designate such concern for the negotiation of such requirement if—

"(A) the concern is a responsible contractor for such proposed award;

"(B) the award of the requirement would be in accord with the targets, objectives, and goals contained in such concern's approved business plan; and

"(C) the award would not exceed the amounts specified in subsection (a)(1)(E)(i).

"(17)(A) If contract requirements are offered to the Administration for potential award pursuant to this subsection, and eligible small business concerns are neither nominated for award nor identified as causing the agency to offer the requirements to the Administration, such requirements shall be equitably allocated by the Administration.".

(d) SUBCONTRACT LIMITATIONS.—

(1) Section 8(a)(14) of the Small Business Act is amended to read as follows:

"(14)(A) A concern may not be awarded a contract under this subsection as a small business concern unless the concern agrees that—

"(i) in the case of a contract for services (except construction), at least 50 per centum of the cost of contract performance incurred for personnel shall be expended for employees of the concern; and

"(ii) in the case of a contract for procurement of supplies (other than procurement from a regular dealer in such supplies), the concern will perform work for at least 50 per centum of the cost of manufacturing the supplies (not including the cost of materials).

"(B) The Administrator may change the percentage under clause (i) or (ii) of subparagraph (A) if the Administrator determines that such change is necessary to reflect conventional industry practices among business concerns that are below the numerical size standard for businesses in that industry category. A percentage established under the preceding sentence may not differ from a percentage established under section 15(o).

"(C) The Administration shall establish, through public rulemaking, requirements similar to those specified in subparagraph (A) to be applicable to contracts for general and specialty construction and to contracts for any other industry category not otherwise subject to the requirements of such subparagraph. The percentage applicable to any such requirement shall be determined in accordance with subparagraph (B), except that such a percentage may not differ from a percentage established under section 15(o) for the same industry category.".

(2) Section 15(o) of the Small Business Act is amended to read as follows:

"(o)(1) A concern may not be awarded a contract under subsection (a) as a small business concern unless the concern agrees that—

"(A) in the case of a contract for services (except construction), at least 50 per centum of the cost of contract performance incurred for personnel shall be expended for employees of the concern; and

"(B) in the case of a contract for procurement of supplies (other than procurement from a regular dealer in such supplies), the concern will perform work for at least 50 per centum of the cost of manufacturing the supplies (not including the cost of materials).

"(2) The Administrator may change the percentage under subparagraph (A) or (B) of paragraph (1) if the Administrator determines that such change is necessary to reflect conventional industry practices among business concerns that are below the numerical size standard for businesses in that industry category.

"(3) The Administration shall establish, through public rulemaking, requirements similar to those specified in paragraph (1) to be applicable to contracts for general and specialty construction and to contracts for any other industry category not otherwise subject to the requirements of such subparagraph. The percentage applicable to any such requirement shall be determined in accordance with paragraph (2).".

(e) PAPERWORK REDUCTION.—Section 8(a)(1) of the Small Business Act is further amended by adding the following new subparagraph:

"(F) The Administration shall, to the maximum extent practicable, minimize delay, eliminate excess regulation, and require only such paperwork as may be necessary to effect the orderly and efficient management of the program established by 7(j)(10) and the award of contracts pursuant to this subsection. The Administration shall make substantial and sustained efforts to achieve a maximum ten-day period as the average processing time for approving options and modifications to existing contracts awarded pursuant to this subsection and submitted to the Administration for approval.".

SEC. 16. FRAUD, WASTE AND ABUSE.

(a) PROHIBITED ACTIONS AND EMPLOYEE RESPONSIBILITIES.—Section 8(a) of the Small Business Act is further amended by adding the following new paragraphs:

"(18)(A) No person within the employ of the Administration shall, during the term of that employment and for a period of two years after such employment has been terminated, engage in any activity or transaction specified in subparagraph (B) with respect to any concern that was certified pursuant to this subsection during such person's term of employment.

"(B) The activities and transactions referred to in subparagraph (A) are—

"(i) the buying, selling or receipt of any legal or beneficial ownership of stock or any other ownership interest or the right to acquire any such interest;

"(ii) the making or carrying out of a written or oral agreement (whether or not legally enforceable) to purchase or otherwise obtain any right or interest described in clause (i); and

"(iii) the receipt of any other benefit or right that may reasonably be considered an incident of ownership.

"(C) Any present or former employee of the Administration who violates this paragraph shall be subject to a civil penalty, assessed by the Attorney General, that shall not exceed 300 per centum of the maximum amount of gain such employee realized or could have realized as a result of engaging in those activities and transactions proscribed by subparagraph (B).

"(19)(A) Any employee of the Administration who has authority to take, direct others to take, recommend, or approve any action with respect to any program or activity conducted pursuant to this subsection or section 7(j), shall not, with respect to any such action, exercise or threaten to exercise such authority on the basis of the political activity or affiliation of any party. Employees of the Administration shall expeditiously report to the Inspector General of the Administration any such action for which such employee's participation has been solicited or directed.

"(B) Any employee who willfully and knowingly violates subparagraph (A) shall be subject to disciplinary action, imposed by the Administrator, which may consist of separation from service, reduction in grade, suspension, or reprimand.

"(C) Any person holding the position of Administrator or Deputy Administrator who willfully and knowingly violates subparagraph (A) shall be separated from service.

"(D) Subparagraph (A) shall not apply to any action taken as a penalty or other enforcement of a violation of any law, rule, or regulation prohibiting or restricting certain political activity.

"(E) The prohibitions of subparagraph (A), and remedial measures provided for under subparagraphs (B) and (C) with regard to such prohibitions, shall be in addition to, and not in lieu of, any other prohibitions, measures or liabilities that may arise under any other provision of law.".

(b) REPORTING.—Section 8(a) of the Small Business Act is further amended by adding the following new paragraph:

"(20)(A) Small business concerns participating in the program conducted under the authority of section 7(j)(10) and eligible to receive contracts pursuant to this subsection shall submit to the Associate Administrator for Minority Small Business and Capital Ownership Development at least once during each three-month period during such concern's term of participation—

"(i) a listing of any agents, representatives, attorneys, accountants, consultants, and other parties (other than employees) receiving compensation from such concern to assist in obtaining Federal contracts for such concern; and

"(ii) the amount of compensation received by the parties identified pursuant to subparagraph (A) over the relevant reporting period and a description of the activities performed in return for such compensation.

"(B) Such Associate Administrator shall immediately report to the Inspector General of the Administration any suspicion of improper activity ascertained from a review of any report received under this paragraph.

"(C) The Associate Administrator shall report to the Committees on Small Business of the Senate and the House of Representatives the names of those concerns that have failed to submit a report under this paragraph within thirty calendar days after such report is due.".

(c) CONTRACT PERFORMANCE.—Section 8(a) of the Small Business Act is further amended by adding the following new paragraph:

"(21)(A) Subject to the provisions of subparagraph (B), a contract (including options) awarded pursuant to this subsection shall be performed by the concern that initially received such contract. Notwithstanding the provisions of the preceding sentence, if the owner or owners upon whom eligibility was based relinquish ownership or control of such concern, or enter into any agreement to relinquish such ownership or control, such contract or option shall be terminated for the convenience of the government, except that no repurchase costs or other damages may be assessed against such concern due solely to the provisions of this subparagraph.

"(B) The Administrator may, as a matter of discretion and on a nondelegable basis, waive the requirements of subparagraph (A) if requested to do so prior to the actual relinquishment of ownership or control. In addition to the requirement of the preceding sentence, a waiver may only be given if one or more of the following conditions exist:

"(i) Exceptional circumstances evidence a manifest hardship on such socially and economically disadvantaged individuals, and the failure to give a waiver would substantially harm the public interest.

"(ii) When it is necessary for the owners of the concern to surrender partial control of such concern on a temporary basis in order to obtain equity financing.".

(d) CRIMINAL PENALTIES.—Section 16(d) of the Small Business Act is amended—

(1) by striking "$50,000" and inserting "$500,000"; and

(2) by striking "five years" and inserting "ten years".

(e) INSPECTOR GENERAL INVESTIGATIONS.—Section 10(e) of the Small Business Act is amended by—

(1) inserting "and the Inspector General of the Administration" immediately after "Administration",

(2) inserting "(1)" immediately after "(e)", and

(3) adding the following new paragraph:

"(2)(A) The Committee on Small Business of either the Senate or the House of Representatives may request that the Inspector General of the Administration conduct an investigation of any program or activity conducted under the authority of sections 7(j) or 8(a) of this Act. Not later than fifteen days after the receipt of such a request, the Inspector General shall inform the committee, in writing, of the estimated time needed to complete the investigation, or shall deny the request for good cause. If the committee's request is denied, the Inspector General shall provide the committee with a written and detailed explanation of the reasons for the denial within such fifteen-day period.

"(B) The Office of the Inspector General shall keep the committee duly informed of the progress of any investigation conducted pursuant to subparagraph (A) and shall furnish such committee, in a timely manner, a detailed written report of its findings, conclusions, and recommendations.".

(f) STATUS OF THE ASSOCIATE ADMINISTRATOR FOR MINORITY SMALL BUSINESS AND CAPITAL OWNERSHIP DEVELOPMENT.—Section 4(b)(1) of the Small Business Act is amended by inserting immediately after "Associate Administrator for Minority Small Business and Capital Ownership Development" the following: "who shall be an employee in the competitive service or in the Senior Executive Service and a career appointee".

SEC. 17. "NON-MANUFACTURER" RULE.

Section 8(a) of the Small Business Act is further amended by adding the following new paragraph:

"(22)(A) An otherwise responsible business concern that is in compliance with the requirements of subparagraph (B) shall not be denied the opportunity to submit and have considered its offer for any procurement contract for the supply of a product to be let pursuant to this subsection or subsection (a) of section 15 solely because such concern is other than the actual manufacturer or processor of the product to be supplied under the contract.

"(B) To be in compliance with the requirements referred to in subparagraph (A), such a business concern shall—

"(i) be primarily engaged in the wholesale or retail trade;

"(ii) be a regular dealer, as defined pursuant to section 35(a) of title 41, United States Code (popularly referred to as the Walsh-Healey Public Contracts Act), in the product to be offered the Government or be specifically exempted from such section by section 7(j)(12)(B); and

"(iii) represent that it will supply the product of a domestic small business manufacturer or processor, except that, the Administrator may waive the application of this clause, as it pertains to the furnishing of a product manufactured or processed by a small business, for any class of products for which there are no small business manufacturers or processors participating in the Federal market.".

SEC. 18. SUBCONTRACTING PROGRAM.

Section 8(d)(4)(E) of the Small Business Act is amended by—

(1) inserting "(i)" immediately after "(E)"; and

(2) adding the following new clause:

"(ii) Every contract to be awarded after the effective date of this clause and that is subject to the requirements of paragraph (4) or (5), shall contain a provision providing for liquidated damages in the event that the prime contractor fails to comply in good faith with the clause contained in paragraph (3) or with any plan required of such contractor pursuant to the authority of this subsection. The awarding agency shall ensure, by reviewing the past performance of the apparent successful offeror or bidder, that such bidder or offeror has not offered goals that are unreasonably below its actual past performance.".

SEC. 19. RELATIONSHIP WITH OTHER PROCUREMENT PROGRAMS.

Section 15(m) of the Small Business Act is amended to read as follows:

"(m)(1) Each agency subject to the requirements of section 1207 of Public Law 99-661 shall, when implementing such requirements—

"(A) establish policies and procedures that insure that there will be no reduction in the current number or dollar value of contracts awarded pursuant to this section and section 8(a) in order to achieve any goal or other program objective; and

"(B) implement such section 1207 in a manner that will not alter or change the procurement process used to implement this section or section 8(a).

"(2) All procurement center representatives (including those referred to in subsection (k)(6)), in addition to such other duties as may be designated by the Administrator, shall—

"(A) monitor the performance of the procurement activities to which they are assigned to ascertain the degree of compliance with the requirements of paragraph (1);

"(B) report to their immediate supervisors all instances of noncompliance with such requirements; and

"(C) increase, insofar as possible, the number and dollar value of procurements that may be used for the programs established under this section, section 8(a), and section 1207 of Public Law 99-661.

"(3) A business concern shall not be considered other than a small business concern, for purposes of section 1207 of Public Law 99-661, solely because its receipts or number of employees exceed the applicable numerical size standard (established pursuant to section 3 of this Act) in effect as of October 1, 1987, unless such receipts or number of employees exceed such size standard by more than 25 per centum.".

SEC. 20. STANDARD INDUSTRIAL CLASSIFICATION CODE LIMITATIONS.

Section 8(a)(7) of the Small Business Act is amended by—

(1) inserting "(A)" after "(7)"; and

(2) adding the following new subparagraph:

"(B) Limitations established by the Administration in its regulations and procedures restricting the award of contracts pursuant to this subsection to a limited number of standard industrial classification codes in an approved business plan shall not be applied in a manner that inhibits the logical business progression by a participating small business concern into areas of industrial endeavor where such concern has the potential for success.".

SEC. 21. DIRECTORS OF SMALL AND DISADVANTAGED BUSINESS UTILIZATION.

Section 15(k) of the Small Business Act is amended by—

(1) amending paragraph (3) to read as follows:

"(3) be responsible only to, and report directly to, the head of such agency or to the deputy of such head;";

(2) striking "and" at the end of paragraph (6);

(3) striking the period at the end of paragraph (7) and inserting in lieu thereof ", and"; and

(4) adding at the end thereof the following new paragraph:

"(8) make recommendations to contracting officers whether a particular contract requirement should be awarded pursuant to subsection (a), section 8(a) or section 1207 of Public Law 99-661. Such recommendations shall be made with due regard to the requirements of subsection (m) and the failure of the contracting officer to accept any such recommendations shall be documented and included within the appropriate contract file.".

SEC. 22. REGULATIONS.

The Small Business Administration shall—

(1) within sixty days after the date of enactment of this Act conduct meetings of present and potential participants in the program established by sections 7(j)(10) of the Small Business Act, as amended by this Act, to ascertain and consider public comment on the nature and extent of regulations needed to implement this Act;

(2) within one hundred and twenty days after the date of enactment of this Act, publish in the Federal Register proposed rules and regulations implementing this Act; and

(3) within two hundred and ten days after the date of enactment of this Act, publish in the Federal Register final rules and regulations implementing this Act.

SEC. 23. EMPLOYEE TRAINING AND EVALUATIONS.

(a) TRAINING REQUIREMENT.—No person within the employ of the Small Business Administration shall perform any of the principle functions of a Business Opportunity Specialist as those functions relate to the provisions of this Act, unless such person first receives training on how to successfully operate the Capital Ownership Development Program and achieve its stated purposes. The provisions of the preceding sentence may be waived by the Administrator for new hires or those employees newly classified or assigned as a Business Opportunity Specialist except that, such waiver for any such hire or employee shall not extend for a period of longer than ninety days.

(b) DUTIES OF BUSINESS OPPORTUNITY SPECIALISTS.—An individual within the employ of the Small Business Administration who is designated to perform the functions of a Business Opportunity Specialist in addition to the duties and responsibilities specified in this Act, shall—

(1) conduct contract negotiations on behalf of such Administration for contracts awarded pursuant to section 8(a) of the Small Business Act when performance will be rendered by one or more firms in such Specialist's assigned portfolio; and

(2) facilitate and otherwise assist such firms in negotiating for the receipt by them of any contract to be let pursuant to section 8(a) of such Act.

(c) TRAINING RESPONSIBILITIES.—The Administration shall take such actions as may be appropriate to train and qualify such Specialists to perform such negotiations.

(d) PERFORMANCE EVALUATIONS.—To the extent practicable, the Administrator shall ensure that the performance appraisal system applicable to a Business Opportunity Specialist affords substantial recognition to how well such Specialist's assigned portfolio of concerns participating in the program established by section 7(j)(10) of the Small Business Act are achieving competitiveness and furthering the business development purposes of the program.

SEC. 24. MISCELLANEOUS AND TECHNICAL PROVISIONS.

(a) ANNUAL GAO REPORT.—Section 7(j)(8) of the Small Business Act is amended by striking "January 1, 1981" and all that follows and by inserting in lieu thereof "January 1 of each year.".

(b) REPEALER.—Section 106 of Public Law 96-481 is repealed.

(c) INDIAN TRIBE EXEMPTION.—Section 8(a)(1)(E)(i) of the Small Business Act, as amended by section 11 of this Act, shall not apply to concerns owned and controlled by economically disadvantaged Indian tribes as defined pursuant to paragraphs (4) and (13) of section 8(a) of the Small Business Act.

(d) CONTINUATION OF COMPETITION FOR CERTAIN CONTRACT REQUIREMENTS.—Notwithstanding any other provision of this Act, contract requirements that have been historically competed pursuant to section 8(a) of the Small Business Act before the effective date of this Act shall continue to be competed if—

(1) such competition was based on price and other price related factors; and

(2) there is a reasonable expectation that at least two responsible small business concerns, eligible for the award of contracts pursuant to such section, will continue to submit offers at fair market prices.

(e) UNPRICED OPTIONS.—(1) Within sixty days after the date of enactment of this Act, the Small Business Administration, and the appropriate Federal agency, shall make substantial and sustained efforts to negotiate contract modifications for fair market price for any and all unpriced options contained in contracts previously awarded pursuant to section 8(a) of the Small Business Act with the contractor that was initially awarded such contract.

(2) During the period of time described in paragraph (1) such agencies shall refrain from procuring such requirements from alternative sources except that, no delay may be incurred pursuant to this paragraph that would cause substantial harm to a public interest.

(3) The Small Business Administration shall take appropriate actions, including publication in the Federal Register, to advise small business concerns and Federal agencies of the requirements of this subsection.

SEC. 25. AUTHORIZATIONS.

For fiscal year 1988, there is authorized to be appropriated $4,735,000 to implement the requirements of sections 20, 23 and, 24 of this Act. Of the amount authorized to be appropriated—

(1) $735,000 shall be used for the hire of Procurement Center Representatives; and

(2) $2,765,000 shall be used for the hire of Business Opportunity Specialists.

SEC. 26. EFFECTIVE DATES.

Except as otherwise provided, this Act shall become effective one year after the date of enactment, except that sections 5, 12, 19, 20, 21, 22, and 23 of this Act shall become effective on the date of enactment.

SEC. 27. REVIEW OF COMPETITIVE THRESHOLDS.

(a) REPORT.—Beginning one year after the date of enactment of this Act, and at intervals of one year thereafter for an additional period of two years, the Comptroller General of the United States shall transmit a report to Congress describing the results of a detailed review, conducted by the Comptroller General, on the implementation of the amendments made by section 11 of this Act. Each such report shall pertain to the preceding twelve month period and shall contain—

(1) a specific determination as to whether the implementation of section 11 has furthered the business development purposes of this Act; and

(2) such recommendations for competitive procurement techniques as may be necessary to advance such purposes.

(b) TERMINATION OF SECTION 11.—Section 11 of this Act shall cease to be effective one year after receipt of the last report required to be transmitted pursuant to (a) if—

(1) the Comptroller General determines and reports that the implementation of section 11 has impeded the business development purposes of this Act; and

(2) a Joint Resolution of the Congress has been enacted agreeing with the findings of the Comptroller General and providing for a new or modified system to insure appropriate competition in the award of contracts pursuant to section 8(a) of the Small Business Act to commence one year after the receipt of the last report required by subsection (a).

THE PURPOSE OF THE BILL

The primary purpose of H.R. 1807 is to redirect the Capital Ownership Development Program toward business development objectives and to protect the integrity of that effort by improving safeguards against fraud, waste and abuse.

The Capital Ownership Development Program (commonly referred to as the section 8(a) program) is the Federal government's most significant effort to redress the effects of discrimination on entrepreneurial endeavors. The program has helped to develop many small businesses whose socially and economically disadvantaged owners have amply demonstrated their ability to excel when afforded a fair opportunity. The concomitant benefits of these efforts on minority employment, the infusion of capital into depressed areas and the expansion of the industrial base, all serve to underscore the potential of the program. However, over the years the program has been, generally misunderstood, misused or, simply, mismanaged.

As a result, the program has consistently fallen short of its intended goals, and has failed to deliver on its promise to help a broad class of socially and economically disadvantaged individuals to compete in the mainstream of the American economy. H.R. 1807 is intended to restore that promise.

Many have equated the 8(a) program with a set-aside. But the primary purpose of a set-aside is to affect market share on an immediate and demonstrable basis. The purpose of 8(a), on the other hand, is to create on-going small businesses that can compete on their own once they leave the program. The more successful this effort, the more the market share will eventually right itself in the future. In short, the 8(a) program is designed to promote the development of firms so that set-asides *will not be necessary* in the future. While set-aside programs have the desired benefit of immediately redressing the maldistribution of work, they do little to

insure that the eligible firms will become or remain competitive in the absense of such programs. While both business development and set-aside strategies are needed in proper combinations, they should not be confused or blurred into a single effort for fear of losing one or the other.

The 8(a) authority carves out an exception to the general rule that Federal purchases should, when possible, be open to competition among all responsible businesses. The justification for this exception is highly supportable in view of the purposes of the program. However, the sole-source authority of 8(a) has been misused by Administrations of both parties to achieve varying political purposes not associated with business development. Moreover, in recent years there has been a sharp trend toward awarding larger sized contracts to fewer firms. Increasingly, the program is dominated by a relatively small number of firms which receive the bulk of the large 8(a) contracts, while most firms received no 8(a) contracts at all during the last fiscal year. Finally, a few individuals have become so obsessed with the potential for exorbitant gains from sole source contracts that they did not hesitate to cross over the lines of legally permissible activity.

In the middle of this shifting course of political purposes and abuse of sole source authority is the Small Business Administration (SBA). Instead of safeguarding the integrity of the program and promoting its objectives, SBA has consistently mismanaged the effort and has made countless efforts to avoid what it should be doing—helping to create competitive small business firms owned by socially and economically disadvantaged individuals. The Committee understands that business development is one of the most complex areas in which the government can involve itself. But it is precisely that opportunity for business development that is the intended purpose of the Capital Ownership Development Program and which SBA should no longer avoid due to bureaucratic expediency, disagreement with Congressional policy, or any other purpose.

H.R. 1807 is the result of the Committee's concern for restoring the business development purposes of the program, better defining the intent of given procurement authorities, and protecting the program from abuse and mismanagement. It is for these purposes that H.R. 1807 was considered and ordered favorably reported.

Introduction and Background

The bill, H.R. 1807, was introduced on March 25, 1987 by Representative Nicholas Mavroules, Chairman of the Subcommittee on Procurement, Innovation and Minority Enterprise Development, and originally co-sponsored by Representatives Hayes, Conyers, Mfume, Flake, Eckart, Savage, Torres, Lancaster and Gonzalez. At the time of filing of this report, the bill had a total of 36 co-sponsors, including 22 Members of the Committee on Small Business.

The bill was solely referred to this Committee and, subsequently, referred to the Subcommittee on Procurement, Innovation and Minority Enterprise Development.

The Subcommittee held six (6) days of extensive hearings and after careful and extensive review of additional materials, data and investigative reports, the Subcommittee conducted its mark-up on

July 28, 1987. The Subcommittee favorably reported, by a unanimous vote of 14–0, an amendment in the nature of a substitute sponsored by Chairman Mavroules and the Ranking Minority Member of the Subcommittee, Representative Silvio Conte.

On September 29, 1987, the full Committee conducted a day of hearings to ascertain the Administration's position on the Subcommittee's reported bill. After consideration of the submitted testimony, further statistical analysis and extensive consultation with concerned parties, the full Committee met on November 9, 1987 to mark-up the measure.

At the November 9 meeting, the full Committee adopted a motion to mark-up from an October 30, 1987 Committee Print of H.R. 1807 which contained several substantive differences from the Subcommittee' s reported bill. That Committee Print had been developed on a bi-partisan basis by the Chairman of the Full Committee, Representative John J. LaFalce, Ranking Minority Member, Joseph M. McDade and Representatives Mavroules and Conte, after extensive consultations with the Members of the Committee and representatives of the administration. By a vote of 40–1 the full Committee ordered H.R. 1807 favorably reported with an amendment in the nature of a substitute (the October 30, 1987 Committee Print), with amendments.

The Need for the Legislation

SEC. 2. FINDINGS AND PURPOSES

According to the most recent statistics available, only six percent of all firms are owned by minorities; less than two percent of minorities own businesses while the comparable percent for nonminorities is over six percent; and the average receipts per minority firm is less than 10 percent the average receipts of all businesses.

A review of Federal procurement data reveals a similar pattern of economic disparity. Small businesses owned and controlled by socially and economically disadvantaged individuals (most of whom are minority) receive a disproportionately small share of Federal purchases. According to the Minority Business Development Agency, in fiscal year 1986, total prime contracts approached $185 billion, yet minority business received only $5 billion in prime contracts, or about 2.7 percent of the prime contract dollar. Of that small amount, section 8(a) awards, under the Small Business Act, exceeded $3 billion or nearly 60 percent of the share of the Federal purchase dollar awarded to minority firms. Accordingly, there is a high dependence rate on the 8(a) program to capture a significantly small share of the Federal acquisition dollar.

The statistics recited above are not the result of random chance. The presumption has been made by past Congresses, and now reaffirmed by this Committee, that discrimination and the present effects of past discrimination have hurt socially and economically disadvantaged individuals in their entrepreneurial endeavors. It is a legitimate purpose of government to correct the imbalance caused by discrimination, and the Capital Ownership Development Program is a reasonable way to achieve that purpose with a minimum amount of "intrusion" on non-disadvantaged individuals.

However, the section 8(a) authority has been misunderstood, misused and mismanaged in the past. The Committee believes it is necessary and appropriate for Congress to intervene legislatively to correct these historic, yet recurring problems.

The original Small Business Act of 1953 contained authority allowing SBA to contract with Federal buying agencies and, then, to subcontract with business concerns for the actual performance of the requirement.

In 1958, SBA issued its first regulations implementing section 8(a). Those regulations indicated that SBA's section 8(a) power was to be exercised in the event of emergency for the benefit of small business as a class and on a publicized, competitive basis.

Following widespread urban riots in 1967, the Kerner Commission investigated civil disorder in the nation's inner cities. This investigation revealed the fact that in the area of Government assistance to small business, in general, there were truly two societies; "one Black and one White . . . separate and unequal." Consequently, the Commission recommended that the Government encourage business development. In late 1968, the Administration decided to use the 8(a) authority to channel contracts to firms of all sizes located in the inner-cities in an attempt to quell this urban unrest.

SBA gradually changed the 8(a) program emphasis, beginning in 1969, from hiring the unemployed in ghetto areas to awarding contracts to firms owned by disadvantaged persons. It was broadened to encompass noncompetitive contract support for disadvantaged small businesses, though these contracts were not restricted to minority-owned firms. In 1970, the regulations were amended to state that a firm must be owned or be destined to be owned (through a divestiture agreement) by socially *or* economically disadvantaged persons in order to be eligible for an 8(a) contract.

Unfortunately, because the program was administered primarily for the purpose of getting contracts to a class of eligibles as rapidly as possible, little attention was paid to business development or, for that matter, insuring that the recipients of these contracts were truly disadvantaged. As a result, the program received much criticism from many different sources.

A General Accounting Office (GAO) report, "The Questionable Effectiveness of the 8(a) Program" (April 16, 1975), was highly critical of SBA's efforts to make 8(a) firms competitive. In July of the same year, this Committee issued an investigative report (House Report 95-468) that criticized SBA's management of the 8(a) program and called for a series of measures that would help focus the program on business development. In 1978, the Senate Governmental Affairs Committee conducted extensive hearings on the program's problems with "front" companies—firms represented by disadvantaged individuals but actually controlled by, and primarily benefiting nondisadvantaged persons.

Congress enacted P.L. 95-507 in October of 1978 in an attempt to correct many of these problems and abuses. The Conference Report (H. Rpt. 95-1714) pertaining to P.L. 95-507 aptly summarized the concerns of the Congress at that time:

> The Conferees intend that the primary beneficiaries of this program will be minorities but that the authorities

> given SBA pursuant to this subsection and section 7(j)(10) will be used solely for economic and business development and not merely to channel contracts at a random pace to a preconceived group of eligibles for the sake of social or political goals.

In P.L. 95–507, Congress finally articulated that the purpose of 8(a) was to develop competitive businesses owned by disadvantaged individuals. There was a clear statement of findings and purposes which provides the foundation for the program. Briefly, Congress stated: that social and economic inequalities based on ethnicity exist in our society; that it is in the national interest to ameliorate such conditions; and, that the development of small businesses owned by members of specified disadvantaged groups can significantly contribute to redressing observed inequalities. P.L. 95–507 provided for management and technical assistance to 8(a) firms. It also expanded SBA's authority to achieve business development by obtaining Federal contracts of increasing dollar values and sophistication. Another significant provision in P.L. 95–507 was the limit it placed on eligible program participants. In an effort to address the noted problems of "front" companies, the law required that 8(a) firms be owned by individuals who are both socially *and* economically disadvantaged. With the enactment of P.L. 95–507, the evolution of the 8(a) program into a business development program was greatly advanced. However, the intent of P.L. 95–507 has not been fully realized.

Despite the provisions of P.L. 95–507, in the late 1970's the then incumbent administration, like those before it, could not resist using 8(a) for its own political agenda. That Administration promised the minority community that it would double, then, triple, purchases from minority owned firms. The 8(a) program was used to achieve this goal. While increasing awards and business development are not mutually exclusive, it is clear that business development was made totally subordinate to achieving the President's goal of tripling awards.

By 1980, Congress was called upon, once again, to reaffirm its position with respect to the 8(a) authority. Despite the enactment of P.L. 95–507 two years previously, SBA had still failed to develop firms to a point where they could "graduate" from the program. Rather, large firms were being maintained in 8(a) partiallly because of their contribution to meeting increased goals, and partially due to their political influence.

On October 21, 1980, President Carter signed P.L. 96–481. That law required that SBA and each 8(a) firm mutually agree upon a specific date when the firm would be expected to overcome its economic disadvantage. In other words, P.L. 96–481 was an attempt by Congress to force SBA to redirect the program to its business development objective.

In April 1981, the Comptroller General issued a report entitled "The SBA 8(a) Procurement Program—A Promise Unfulfilled" which introduced the concept of competition into the 8(a) program. The report found:

(1) 50 firms received 31 percent of all contract dollars and three-fifths of these firms were in the program between 7 and 11 years;

(2) firms became overly reliant on 8(a) contracts and did not develop non 8(a) business despite projections in their business plans to do so; and

(3) Most firms viewed 8(a) as a contract program only.

In the Spring of 1982, the Administration instituted a complicated two-tiered set of fixed program participation terms (FPPT) which paid little or no attention to how long firms had already been in the program, or their current competitive status.

The program has now grown to a point where it is producing over $3 billion a year in contracts and accounts for approximately 60 percent of all prime contract awards to minority business. The 8(a) program has a portfolio of about 3,000 firms employing hundreds of thousands of people. Regardless of its magnitude and importance, however, it has been continuously misused by each Administration since the late 1960's. Over the past two decades, the goal of business development has never really been the focus of the program.

Therefore, it is now necessary for Congress to state explicitly its intentions and to reaffirm, in the strongest possible terms, its commitment to a business development effort that will assist significant numbers of small disadvantaged businesses.

SEC. 3. BUSINESS DEVELOPMENT OBJECTIVES

The Committee has been critical of SBA's management of the 8(a) and 7(j) programs for its failure to emphasize the business development purpose basic to the Capital Ownership Development Program. This Committee has consistently maintained that these program authorities were never intended to be used as a "hunting license" for sole source contracts. Instead, SBA was to devote its resources and efforts to helping the establishing of small business concerns owned by the socially and economically disadvantaged.

The development of business concerns that can compete on an equal basis with firms that are not socially and economically disadvantaged is, and must be, the primary purpose of the 8(a) and 7(j) programs. It is necessary, therefore, that the Small Business Act contain a clearer statement of that intent—that business ownership *and business development* are avowed purposes of both 8(a) and 7(j) program activities and that program managers should provide the kinds of assistance most likely to permit participating firms to achieve independence from government support.

A program that provides firms with a limited term of special contract eligibility, only to see them generally flounder and fail upon the expiration of program eligibility cannot be justified as an appropriate expenditure of government resources. Nor does the Committee believe that it is useful to simply admit larger numbers of firms to the program, if those firms cannot be given sufficient assistance to survive in an unsheltered market upon graduation.

A stronger emphasis on the developmental aspects of these government programs is intended and the law must be changed to reflect that objective.

SEC. 4. REQUIREMENTS OF THE CAPITAL OWNERSHIP DEVELOPMENT PROGRAM

Each 8(a) program participant is required to have an approved business plan on file with the SBA. The business plan contains, among other things, a description of the firm, certain financial data, and the approved 8(a) contract support level as well as non-8(a) sales.

The Committee has concluded that, as a business development aid, these plans are, in large measure, useless documents. They are deficient because:

(1) they do not identify what the firm needs to do in the financial, marketing, and management areas in order to become competitive;

(2) they do not identify weaknesses of the firms or contain plans to overcome noted weaknesses;

(3) they provide no way to measure progress against business goals; and

(4) they contain no systematic mechanism to provide for feedback and review of actual performance so that targets, objectives, and goals can be appropriately readjusted to allow the firms to reinforce what they are doing right and change what they are doing wrong.

The Committee also notes that the Capital Ownership Development Program has not provided 8(a) firms with a satisfactory amount or quality of "hands-on" training needed to successfully complete the program. Insufficient attention has been paid to training and, instead, there has been an overemphasis on procurement awards. Properly viewed, 8(a) contracts, while very important, are only one of several tools that SBA should be using to help develop its portfolio of firms. It is business development that is the ultimate objective of the program and not the mere aggregation of contract awards to a revolving group of eligible concerns. While the Committee has often criticized SBA for its disregard of these Congressional purposes (see e.g., *"Minority Business Development Efforts of the Small Business Administration,"* H. Rpt. 97-956, December 10, 1982), the agency has not yet seen fit to change its basic management of the program. Legislation, therefore, is warranted on this subject to require a more reasoned approach to program delivery in accordance with the Congressionally stated purpose of the program.

SEC. 5. EFFECT ON PRESENT PROGRAM PARTICIPANTS

There are approximately three thousand firms currently participating in the 8(a) program and most will still be participating on the date of enactment of this reform measure.

The Committee recognizes the need to provide for a transition from the present program to the newly designed program since the present program provides, on average, for a term of slightly longer than six (6) years and a maximum of seven (7) years.

Accordingly, there is a need to insure that program participants receive the benefit of the longer (9 year) program term provided for by this bill (see section 8).

SEC. 6. TERMINATION AND GRADUATION STANDARDS

Under existing law there is no provision specifying circumstances under which a firm may be required to exit the program. SBA has, however, under its administrative authority, promulgated a series of complicated rules and regulations defining the terms "program completion" (graduation) and "program termination." The agency has also specified, as a matter of some discretion, how a firm may elect to exercise its rights, under section 8(a)(9) of the Act, for a hearing on the record pursuant to the Administrative Procedure Act if a program completion or termination action is proposed.

Committee investigation has confirmed the findings of numerous previous studies that firms within the program are dependent upon 8(a) awards for significant portions of their sales. Accordingly, business firms need better guidelines as to what circumstances would lead to premature exits from the program in order to calculate, with some certainty, the consequences of their actions. That certainty and appropriate due process safeguards are not adequately provided by the current regulatory process or by regulations that SBA can change with minimal notice or public review.

SEC. 7. STAGES OF PROGRAM PARTICIPATION

The SBA does not make any distinction in management and technical assistance provided to firms that have reached varying stages of competitive viability. The Committee, however, believes that the portfolio of firms cannot be considered in such a homogeneous fashion. Divisions need to be made among firms so that appropriate types of assistance can be provided that address the particularized needs of firms that have reached different stages of competitiveness.

The first area of concern is how those divisions or groupings of firms should be organized. The Committee has explored several alternatives in this regard and has concluded that length of time in the program should be used to segment firms into various phases of program participation. Generally, younger firms share common, more basic needs, while the needs of older or more mature firms tend to be more sophisticated.

After participants are segmented by years in the program, it becomes necessary to identify, for each grouping, those types of assistance that would best promote a movement toward business development.

From newer firms in the program, the Committee often hears complaints about the effects of both the Walsh-Healey Public Contracts Act and the Miller Act.

Under the Walsh-Healey Act (41 U.S.C. sec. 35 et seq.) any contract for the manufacture or furnishing of materials, supplies, articles or equipment for over $10,000 must contain a representation that the contractor is the manufacturer of, or a regular dealer in, the items called for under the contact. Regulations implementing this provision have been interpreted as precluding contingent arrangements for materials, equipment, supplies or labor needed to perform the contract.

For section 8(a) firms this prohibition means that an 8(a) firm (other than a regular dealer) must actually secure everything that it needs to become a manufacturer prior to the time that SBA will permit it to enter into contract negotiations. If the negotiations fail, the 8(a) firm will be left with machinery, equipment, and other capital assets it may never have a need to use. Very few, if any 8(a) firms, can afford such a financial gamble.

The Committee has also heard complaints that the Miller Act (40 U.S.C. sec. 270a et seq.) has had the effect of unjustly limiting access to construction contracts by 8(a) firms. Under the Miller Act, any contract exceeding $25,000 for the construction, alteration or repair of any public building or public work of the United States must be accompanied by both a performance and a payment bond.

In order to secure a bond, the Committee is told, a contractor needs a satisfactory "track" record of performance; however, it is impossible to obtain that track record without first having access to bonding. This dilemma has operated, we are told, to preclude equitable minority business participation in federal construction projects.

There is a need to provide qualified firms a fair opportunity to perform these types of contracts, in a manner that protects the legitimate interests of the government, so that such firms, in turn, may establish track records needed to secure bonding.

Other types of assistance are also needed by 8(a) firms if the government is to provide them a fair opportunity to succeed.

Business development requires that a contractor have access to the technology needed to produce its goods or services and the government owns literally tens of thousands of patents and rights to data that remain totally uncommercialized. Similarly, the government owns idle surplus property that could be put to productive use if 8(a) firms were allowed to use it.

The Committee believes there is a need for 8(a) firms to access such technology and property to augment their ability to perform contract work and to develop competitiveness. Employing unused federal property is an ideal way to further these purposes since costs are at a minimum and the government can promote commercialization while, at the same time, help to create on-going competitive concerns.

The Committee is also aware that small concerns have a difficult time competing with larger firms for skilled labor. In fact, many hold the view that smaller firms incur a disproportionatley high share of the training costs for labor since big business hires away many of these workers after they are trained by small business.

Labor, as any other factor of production, has a cost associated with it. Part of that cost is the training and upgrading of job skills. Small minority concerns, because of their relatively small capital base and generally lower incomes, are more disadvantaged when it comes to competing for labor than are other businesses. Consequently, small minority owned firms are more susceptible to the dislocation of skilled workers who can be, and are being, hired away by more established firms.

Skilled labor is as critical to business development as are capital and management, yet the Capital Ownership Development Program has all but ignored this key element of business success. It is

necessary, therefore, that the program address this issue and, in some way, assist 8(a) firms to secure the skilled workers they need to become successful.

As firms grow, their need for capital, and the timing for that capital, becomes acute. Business growth usually progresses at a geometric pace and the failure to secure adequate capital at the right time could severly restrict growth and, in some cases, cause the actual demise of the firm.

SBA has been providing Business Development Expense Grants to 8(a) firms, although there is no specific authority in the Small Business Act allowing the agency to do so. At best, it appears that these grants may be extended on a random basis; at worst, much of this money may have found its way to the "politically-connected" firms in the portfolio. In either event, there is an immediate need to stop this grant program and the abuse that it has engendered.

The Committee believes that it is necesary to provide secured financing to 8(a) firms in order to promote legitimate business development purposes. However, that financing should be in the form of debt so that the government may take repayments and use them to assist additional 8(a) firms. Finally, any financing provided should be done in a way that militates against the potential for abuse and arbitrary allocation on the part of SBA.

The Committee has also noted that a need may exist with more mature firms to "leverage" their capabilities by engaging in joint ventures with larger business concerns. There is some hesitancy to pursue this option, however, because of apprehensions that such an arrangement, if not precisely tailored, may run afoul of antitrust laws.

The Congress did note a similar problem with small "high-tech" firms that wanted to create joint ventures for research and development projects. To accommodate that legitimate need, Congress enacted section 9(d) of the Small Business Act that provides limited anti-trust immunity for such joint ventures under rather stringent circumstances.

The Committee believes that a similar device needs to be fashioned for the exclusive use of 8(a) program participants.

SEC. 8. TIME LIMITATIONS

The present 8(a) program limits the participation terms of 8(a) firms to a maximum of seven years. Each company receives a fixed program participation term (FPPT) of up to five years from the award of its first 8(a) contract, and a possible one-time extension that would bring its total participation term to seven years. The actual length of a firm's FPPT and its extension is determined through a rather complex point system designed by the SBA that appears largely unrelated to business development objectives. This method of setting program participation terms, in addition, has been shown to be flawed, and the Committee believes that the FPPT system inhibits the business developmental efforts of the program and is administratively cumbersome.

Most importantly, FPPTs and extensions lack certainty. The chart below illustrates how FPPTs and extensions vary by listing the SBA regional averages for these program periods (see Exhibit 1).

EXHIBIT 1.—TIME DISTRIBUTION OF FPPT'S ASSIGNED IN EACH OF FISCAL YEARS 1984–86

[Number of years (average)]

Region	Original FPPT			Extension requested			Extension granted		
	1984	1985	1986	1984	1985	1986	1984	1985	1986
1	4.4	3.6	4.5	(1)	(1)	(1)	[2] 1.2	2.4	2.1
2	3.5	3.7	3.2	3.9	3.5	3.1	2.6	2.5	2.3
3	4.0	4.0	3.0	3.3	3.0	3.0	2.0	2.0	2.0
4	4.0	3.9	3.9	4.0	4.4	3.5	1.8	1.9	2.2
5	3.8	4.2	4.3	3.9	3.4	2.7	1.8	2.6	2.0
6	4.0	4.0	4.0	4.0	5.0	5.0	4.0	4.0	4.0
7	4.7	4.1	4.9	3.4	3.0	3.0	2.8	2.9	1.8
8	4.2	4.1	4.0	2.5	2.8	3.0	2.1	2.5	2.8
9	3.9	4.0	3.9	(3)	(3)	4.3	(3)	(3)	2.5
10	4.0	3.9	3.7	3.4	2.9	2.9	2.4	2.6	2.2
National average	4.1	4.0	3.9	[4] 3.6	[4] 3.5	[4] 3.4	[5] 2.3	[5] 2.6	2.4

Notes:
[1] Contractors always requested the maximum time or the difference between their original FPPT and 7 years.
[2] Analyses and granting of FPPT extensions centralized in Washington, DC, in fiscal year 1984.
[3] Although FPPT extension requests were made in fiscal years 1984 and 1985, no reporting mechanism was in place and actions were delayed until fiscal year 1986.
[4] Divisor of 8 used in national average.
[5] Divisor of 9 used in national average.

As can be noted, average FPPTs in FY 1986 ranged from a low of 3.0 years to a high of 4.9 years, and an average extension in FY 1986 varied from 1.8 years up to 4.0 years. Such variations are troublesome for 8(a) companies as well as for SBA. For 8(a) concerns, it is unfair that similar firms in similar circumstances appear to receive different FPPTs or extensions depending on the region in which they happen to be located. It is also difficult for the 8(a) concern to plan its business progress without knowing from the start what their complete program term will be. For SBA, it is inefficient to determine individual program participation terms or extensions for each of the thousands of firms in the program or applying for admission.

SEC. 9. DATA COLLECTION

Accurate data collection is essential for the successful operation of any governmental program. In the case of the 8(a) program, which distributes over $3 billion in contracts to approximately 3,000 participants, comprehensive and systematic data collection must become a top priority of the SBA.

Proper data collection is a prerequisite for successful program management. SBA must have a clear understanding of its 8(a) portfolio and the distribution of program benefits if it is to properly control and effectively operate the program. Through data collection, the strengths and deficiencies of the program can be identified, resource allocation decisions made, and appropriate managerial corrections taken. In addition, data collection can assist SBA to avoid programmatic abuses. Unlike some other programs, there is no set formula for distributing 8(a) benefits and because participating firms require differing amounts of program assistance, some discretion in the allocation of such benefits necessarily exists. Therefore, data collection is needed to insure that the program is

functioning properly and that program benefits are being allocated appropriately.

The 8(a) program also requires an adequate oversight mechanism that is based on programmatic data collection. The goals and purposes of the program are to develop businesses owned by socially and economically disadvantaged individuals and to promote the competitive viability of such firms in the mainstream of the economy. To date, progress toward achieving those objectives has in fact, been totally ignored by the SBA.

Those purposes would, however, be reaffirmed by this bill, and SBA needs to establish clear, objective and measurable success indicators for the 8(a) program and undertake frequent reviews of its ability to reach those standards. The only way to accomplish this is for the agency to construct a useful and accurate data collection system for the 8(a) program—something that is totally lacking at present. Furthermore, regular reporting to Congress from SBA on how well the program is meeting its goals would assist the Committee in fulfilling its oversight responsibilities. Our ability to oversee the 8(a) program is dependent, in large part, on the adequacy of the program's data collection system. Incredibly, in this age of instant retrieval of information, SBA has very little idea of how its three billion dollar program operates; and if information is collected, it is generally not available in any useable form.

Data collection is also necessary in order to clarify the public perception of the 8(a) program. The image of the program has been tainted by highly publicized program abuses. In addition, some individuals may misunderstand the goals, purposes, and need for the 8(a) program. Data collection can help to explain the value of the program in objective terms. For instance, information on the benefits derived by socially and economically disadvantaged individuals and by the economy as a result of the 8(a) program, compared with data on the costs associated with operating the program, will likely justify the program's existence on a cost to benefits ratio. In addition, data on program participants may help alleviate or substantiate concerns regarding the "disadvantaged" status of program eligibles. It is crucial that a program with goals as salutory as those of the 8(a) program be uninhibited by negative public impressions. Conversely, should the data reveal abuses within the program, remedial administrative or legislative actions may be necessary. Hence, appropriate data collection can contribute significantly to improving both the substance and the image of the 8(a) program.

Given the importance of an accurate and comprehensive data collection system for the 8(a) program in terms of program management, oversight, policy and integrity, the current lack of useful information is deplorable. The SBA needs to make the development and maintenance of such a system a top priority.

SEC. 10. CONTRACT SELECTION APPEALS AND DOCUMENTATION

Section 8(a)(1)(A) of the Small Business Act empowers the Small Business Administration (SBA) to enter into contracts with federal buying agencies. It is these requirements that are then subcontracted to 8(a) firms for actual performance. The language of the

existing law is, however, ambiguous with respect to SBA appeal rights.

The law states that upon a SBA request for a contract, the procurement officer has the "discretion to let such procurement contract to the Administration upon such terms and conditions as may be agreed upon between the Administration and the procurement officer." However, the immediately following sentence states: "Whenever the Administration and such procurement officer fail to agree, the matter shall be submitted for determination to the Secretary or the head of the appropriate department or agency by the Administrator."

Some agencies have argued that SBA may appeal a dispute only as to "terms and conditions" after the contracting officer has already decided to negotiate a contract under section 8(a). They claim that the appeal authority does not extend to whether or not a contract should be reserved for 8(a) in the first place.

There are, however, a few agencies that read the provision more broadly and have recognized SBA's right to appeal negative 8(a) selection decisions made by their contracting officers.

While the Committee believes this latter interpretation to be correct, there is a need to provide clarifying statutory language to further the purposes of the program and to provide uniformity in program administration.

The Committee is also aware of several instances when agencies have denied SBA contracts for use in the 8(a) program based upon, what appear to be, arbitrary and capricious determinations. Some contracting officers have denied contracts due merely to their perception that a contract of a particular size or complexity may not be "suitable" for 8(a) firms.

Contract selection decisions should not, of course, be based on stereotypical perceptions of what work may be appropriate for minority owned firms. There is a need to limit, insofar as practicable, this abuse of discretion on the part of some contracting officers.

SEC. 11. COMPETITIVE THRESHOLDS AND CONTRACT DISTRIBUTION

There are three principal reasons why the Committee believes that competition needs to be introduced into the 8(a) program. It is our opinion that such competition will advance the business development objectives of the program; improve the distribution of contracts; and help avoid programmatic abuses.

One major reason in having 8(a) firms compete for certain amounts of their contracts is to advance their competitive development. Competition should be viewed as a developmental tool since program participants must learn how to compete for Federal government contracts if they are to succeed outside of the 8(a) program. It is expected that such competition will be useful in serving this need by assisting firms to sustain viability after leaving the program.

Another reason why competition needs to be included within the 8(a) program is to improve the distribution of contracts. In FY 1986, the top three percent of 8(a) firms received approximately fifty-five percent of the 8(a) contract dollars; and the top ten percent received almost eighty percent of the total contract dollars.

Meanwhile, more than half of the firms eligible for 8(a) contracts did not receive *any* awards during FY 1986.

This pattern is the culmination of a recent trend toward providing relatively few firms with much bigger contracts, thus skewing the program away from business development purposes. Significant contract benefits are reserved for the few who tend to become overreliant on 8(a) awards; while most companies receive very little assistance. In fact, as the total size of awards has increased dramatically in recent years, the actual number of contracts has diminished.

The Committee recognizes that different 8(a) firms have different needs for business development assistance; however, the Committee believes such concentation in program benefits is counterproductive and unfair. The Committee is concerned that 8(a) firms with good "political connections" or who know the "right people" are the ones obtaining most of the 8(a) program benefits. It is believed that a certain amount of competition for such contracts would result in a broader and more equitable distribution of contract awards.

Lastly, competition among 8(a) concerns is necessary to prevent abuses that have arisen due to the sole sourcing of large contracts. While the Committee did not create the reform legislation solely to respond to highly publicized program abuses, it did recognize the need to prevent similar actions from occurring in the future and the need to restore public confidence in the value and integrity of the 8(a) program. Having 8(a) firms compete for the larger contracts, the Committee believes, would diminish the potential for obtaining contracts improperly.

SEC. 12. FAIR MARKET PRICE

Firms in the 8(a) program have had recurring problems with contracting officers who establish fair market prices (FMPs) on the basis of recent awards and lowest competitive prices received by the agency without considering differences in costs, quantities or other variables. This practice makes 8(a) firms vulnerable to predatory bids or "spot pricing" which does not reflect true market conditions. Some firms have been forced into bankruptcy as a result of attempting to perform 8(a) contracts when unit prices were unrelated to actual costs. The firms were given no resources by the contracting officer but to "take it or leave it."

The Small Business Act states that no 8(a) contract may be awarded if the award would result in a cost to the awarding agency that exceeds a fair market price. The statute, however, offers no criteria or guidelines for establishing a fair market price. In a misguided attempt to achieve lower costs to the government, many procurement officers have either misapplied present pricing policies and regulations, or have applied their subjective views on what a fair market price ought to be. All this has accrued to the detriment of 8(a) concerns which the program was, of course, designed to assist.

Although the Federal Acquisition Regulations (FAR) contain a procedure to establish fair market prices for 8(a) contracts (FAR 19.806), the Committee has received evidence that 8(a) firms have

still been subjected to unfortunate experiences with no opportunity to challenge the methods used to evaluate acceptable prices. Legislation is needed to establish statutory guidelines and criteria for estimating fair market prices and to provide a mechanism whereby firms may protest the imposition of prices that are inappropriate and unfair.

SEC. 13. PROGRAM ADMISSION

The present procedure for certifying firms for participation in the 8(a) program is seriously deficient in many regards. It is unfair to eligible applicants, it is difficult to administer property and it does not advance the business development objectives of the program. The process needs to be streamlined and rationalized.

The current certification process is unfair to eligible applicants because it is too long, inequitable, and uncertain. Testimony was received by the Committee raising all of these issues. In terms of the length of the processing period, the Committee learned that it can extend for up to two years, and that it is not uncommon for it to average about one year. The current program admissions process also lacks uniformity. Different 8(a) applicants are subjected to varying degrees of scrutiny and differing applications of program eligibility standards depending upon the area of the country where they file their applications. Moreover, firms applying for 8(a) certification are frequently "left in the dark" throughout the process. They often have difficulty obtaining information from SBA regarding the completeness of their application or the materials that they must provide before their application will be processed.

The current certification process is also cumbersome for SBA. During FY 1986, the certification of firms for the 8(a) program required, on average, more than one-third of the working hours of the typical Business Opportunity Specialist. These individuals are responsible for providing business development assistance to participating firms, the primary purpose of the program. The effectiveness of the program, therefore, can be upgraded dramatically if the efficiency of the certification process is improved. Also, the recordkeeping that is demanded by the current certification process appears to be a burden on SBA. The Committee has had the opportunity to review the admissions files of certain 8(a) applicants and has found those files to be embarrassingly disorganized, complicated, and unworkable. Clearly, the certification process needs to be streamlined for the benefit of SBA as well as the 8(a) applicant and the skills of SBA employees upgraded.

In addition to being streamlined, the current certification process needs to be rationalized. At present, firms are admitted into the program on a first-come, first-served basis with little regard for the number or mix of firms that are allowed to enter the program. There are now approximately 3,000 firms in the program and SBA has difficulty assisting all of them. More than fifty percent of those firms receive no 8(a) contracts in any given year even though determinations are supposed to be made as to the availability of 8(a) contracts for particular firms in a specific location before such firms are admitted into the program. If the certification process is

not rationalized it is clear that most participants will continue to receive limited benefits from the program.

SEC. 14. DUE PROCESS RIGHTS

The Small Business Act presently affords an opportunity for a formal hearing on the record, pursuant to chapter 5 of Title 5 of the United States Code the Administrative Procedures Act (APA) prior to any action that denies all assistance under section 8(a) other than a cessation of program participation resulting from the expiration of a fixed program participating term. The APA contains a full panoply of due process protections including notice of proposed adverse action, opportunity to be heard before an impartial adjudicator, the right to rebut the grounds on which the adverse action is based, a formal record, and a written decision. These protections must, of course, be retained and also extended to other situations in which the rights of an 8(a) contractor can be denied or revoked unilaterally.

First, if a participating firm does not maintain its eligibility, or if it violates applicable law or regulations, or if the concern does not pursue business practices that will promote its competitiveness, it may be terminated from the program.for good cause. SBA regulations lists as examples of good cause, twenty-five situations that constitute grounds for instituting involuntary termination proceedings (13 C.F.R. sec. 124.112).

Secondly, a firm may be denied participation in the 8(a) program when it has substantially achieved the goals and ojectives established in its business plan. Under these circumstances a program participant may be "graduated" prior to the expiration of its participation term. These types of firms have received sufficient assistance and program support to enable them to grow in capacity and ability to compete in an unsheltered marketplace without 8(a) contract support. Such firms should be required to graduate making room for lesser developed, truly disadvantaged firms to enter the program.

H.R. 1807 creates yet a third situation in which SBA may exercise its administrative judgment to deny program benefits. Section 16 permits the Administrator of the SBA, under certain circumstances, to waive the requirement that an 8(a) contract or option be terminated if the contractor relinquishes ownership or control of the firm during contract performance. As with termination and graduation decisions, there is a need to insure an independent and impartial review of such important program decisions that can make the difference between the very survival or demise of the firm.

It is to be expected that strong disagreements may arise between SBA and a firm that is the subject of one or more of the actions described above. In each of these three situations, graduation, termination, and waiver of ownership and control requirements, SBA has the power to deny or revoke a right. An equitable means of adjudicating disagreements is both desirable and necessary. Due process considerations require that these administrative decisions be accompanied by protections against the exercise of such authority in an arbitrary, capricious, or unlawful manner. The availability of

APA proceedings is needed to prevent unreasonable denial of benefits otherwise available to 8(a) participants.

SEC. 15. CONTRACT REQUIREMENTS

Pursuant to section 8(a)(12) of the Small Business Act, the Associate Administrator for Minority Small Business and Capital Ownership Development is to submit a yearly estimate, to each agency, of the dollar amount and types of contracts needed for the conduct of the 8(a) program.

The Committee is not aware of any organized effort within SBA to utilize fully the authority of section 8(a)(12). However, it is noted that this provision will become increasingly important if the business development goals of the program are to be met, and the introduction of competition into the award of contracts is to be handled smoothly.

While access to contract support is critical for the successful conduct of the program, over reliance on 8(a) contracts by a program participant can lead to the failure of that business once it leaves the program. SBA does not, however, maintain statistics or other data on firms that have exited the program. As indicated proviously, this shows a fundamental disregard for the purposes of the program since the agency does not even collect statistics vital to determine whether or not those purposes are being realized.

The most extensive study on so-called 8(a) "graduates" was recently conducted by the Senate Committee on Small Business ("Survey of the Graduates of the Small Business Administration Section 8(a) Minority Business Development Program," S. Rpt. 100–29, May 12, 1987). The survey involved 461 firms that left the program as the result of fixed program participation terms first established under P.L. 96-481. The study stated, in part that:

> The Committee continues to be concerned about the probable Out of Business Rate of graduates and the high level of criticism lodged against various aspects of the 8(a) program by many participants. The thirty percent of the total survey sample that may be out of business, coupled with twenty-two percent of the respondents who indicated they were not doing well are troubling statistics. Moreover, the perception of many graduates that the program did not significantly contribute to their ability to survive is a clear indication that the program is not effectively or consistently developing or preparing businesses for the competitive marketplace . ıd suggests that fundamental changes in the program are needed.

The original proponents of fixed program participation terms argued that definite closure to a firm's participation would, by itself, encourage the firm to seek non-8(a) contracts. This, however, has not happened. Fixed program participation terms (FPPTs) are now viewed as "hunting licenses" allowing firms to thrash after contracts in order to maximize their awards while in the program.

SBA presently makes no effort to deal with companies becoming overly reliant on 8(a) awards. In fact, in recent years SBA has been justifiably accused of awarding "graduation gifts"—large 8(a) contracts—in the firms's last year in the program in order to propel

them forward into the competitive market place. One newspaper reported an 8(a) firm that received 15 sole source contracts totalling more than $54 million in the two months before it graduated from the program ("SBA's 'Graduation' Contracts Attract Scurtiny of Congress", Wall Street Journal, May 11, 1987, p. 29).

Unfortunately, these graduation gifts make firms so totally dependent on 8(a) that they are either likely to fail once the support is removed, or they become takeover targets of other larger—and non-minority—businesses looking for easy entry into a particular field of government contracting.

Whether or not the firm is a recipient of a graduation gift, it is clear that SBA presently allows, if not encourages, firms to become overly dependent on 8(a) contracts, and does little, if anything, to help these firms to get ready to compete once such contract support is removed. It is appropriate, therefore, to set specific goals and guidelines concerning the mix of 8(a)/non 8(a) contracts.

Even if SBA establishes and maintain proper 8(a) support levels there is the additional problem of how to allocate available contracts among responsible firms. The Committee has been advised that some contract allocation decisions have been based upon political influence or regional favoritism. In still other cases, the Committee has received allegations that contracts are denied 8(a) firms in reprisal for some act that an SBA official subjectively believes is deserving of a punitive or remedial response. It is necessary, therefore, to provide some statutory guidance in the allocation of available 8(a) contracts to both protect the integrity of the program and to insure that contract support is used solely to promote business development.

After contracts are awarded under section 8(a) it remains vital to the purpose of the program that a sufficient percentage of the work be performed by the small business awardee. The same tenet holds true for the small business set-aside program. This is needed to prevent the "brokering" of contracts or, in other works, to prevent the firm from awarding such an unreasonable portion of the work to another firm that it is, in effect, selling off its contract to another party.

Not only does brokering increase costs to the government, but it also detracts from the purpose of both the 8(a) program and the set-aside program. With respect to 8(a), it is obvious that business development is not served if the actual work is performend by other than the 8(a) concern. In the case of the small business set-aside program, such contracts are intended, among other things, to expand the mobilization base and provide for defense needs. These purposes are not realized when the actual beneficiary of a small business set-aside is other than the small business awardee.

SBA does maintain subcontract limitations for 8(a) contracts, but does not have similar limitations for small business set-asides. However, it may, on a case-by-case basis, find that a particular subcontracting relationship establishes an "unusual reliance" between the small business awardee and its subcontractor thereby giving rise to a finding of affiliation. The percentage where this "unusual reliance" is found varies from case to case. In one case 94 percent subcontracting was sufficient; while in another case only 37 percent subcontracting established the affiliation.

In order to address these and other problems, Congress enacted section 921(c) of P.L. 99-661 during the last Congress. Generally, that section required, among other things, that in order to be considered a small business for an 8(a) contract or a small business set-aside, the offering firm must represent that it will perform a specific percentage of the work (most often 50 percent) with its own employees.

There are some efforts, initiated by the Senate, to restrict severely the effectiveness of section 921. The legislative vehicle for this revision was intended to be an authorization act for the Department of Defense. Since subcontracting restrictions are integral to preserving the integrity of the 8(a) program, it is necessary that those provisions be reiterated in this bill to address the efforts of the Senate and to insure that the matters will be resolved by the Committees on Small Business of the House and the Senate.

Finally, the Committee has received some complaints about the delinquency of the SBA in performing contract administration functions. The Committee is advised that 8(a) firms have lost options or modifications providing for new work or for upward price adjustments because of SBA delay. While the magnitude of this problem is not known, the Committee believes it necessary to establish legislatively an average processing time for such administrative actions.

SEC. 16. FRAUD, WASTE AND ABUSE

The public perception of the section 8(a) program is deteriorating. Recently, the program has been shaken by scandals that some have cited as reason to call for the elimination of the entire program effort.

The Committee strongly supports the purposes of the 8(a) program and cautions against over reaction to the recent scandals. The Committee believes it necessary, however, to enact laws that will safeguard against the possibility of future abuses. This, it is believed, is needed to help restore credibility and public confidence in the program.

Initially, there is a need to specify the bounds of permissible relationships between 8(a) firms and present and former SBA employees. While SBA does have several regulations pertaining to this issue, they are vague, confusing, and do not appear to have a sufficiently acceptable deterrent effect (see, for example, 13 C.F.R. sec. 105.506).

In addition, while there is a SBA regulation (13 C.F.R. sec. 105.5165) requiring SBA employees to report to their Inspector General actual or "suspected" acts of "malfeasance or misfeasance or other irregularities", the Committee believes this is not uniformly done. Once again, there appears to be no specific remedy for the failure to report even though such reporting may well have prevented past situations from growing into major scandals.

The Committee also notes that many 8(a) firms have retained "consultants" or other "lobbyists" in an attempt to assist in securing 8(a) contracts. While the use of consultants and similar professionals may be an appropriate and acceptable practice, contracts, of course, should never be awarded on the basis of improper political

influence or political affiliation. The Committee believes that SBA has not sufficiently monitored the use of such consultants by section 8(a) concerns. As a consequence, the Committee has been advised of inordinately high fees and improper lobbying in order to obtain 8(a) contracts. The Committee does not know how widespread this practice is but, to the extent it does exist, it destroys the integrity of the program. There is an obvious need to monitor any activity that is taking place in this area of program operations.

The Committee is also deeply concerned with a situation that, if allowed to continue, would severely undermine the purpose of the 8(a) program. We are advised that at least on seven past occasions section 8(a) firms have sold out to large non-disadvantaged businesses immediately after or near the expiration of their fixed program participation terms. The new owners receive the benefits of all 8(a) contracts and contract options, valued at tens of millions of dollars, held at the time of sale and, to make matters worse, the performance of those contracts and options is still recorded as contract award dollars to disadvantaged businesses.

EXHIBIT 2.—FIRMS THAT HAVE EXITED THE 8(a) PROGRAM DURING THE LAST 5 YEARS AND HAVE BEEN ACQUIRED BY LARGE NON-DISADVANTAGED BUSINESSES

Name of firm	Exit date	Date of acquisition by large non-disadvantaged business
Brock International: Case No. 10212	Oct. 2, 1983	Oct. 2, 1983.
Advance Technology Engineering: Case No. 10562	Apr. 12, 1986	Apr. 17, 1986.
International Business Services: Case No. 30027	Oct. 21, 1985	Dec. 31, 1985.
Sterling Systems: Case No. 32038	Feb. 14, 1983	Feb. 14, 1983.
Systems & Applied Sciences: Case No. 30587	Oct. 21, 1984	Oct. 1, 1986.
AMEX Systems: Case No. 90158	Oct. 16, 1984	Aug. 19, 1984.
Capital Systems: Case No. 30850	Apr. 21, 1987	Apr. 28, 1986.

While limited, it appears from the Committee's investigation that some 8(a) firms receive "graduation gifts" which make them attractive takeover targets when they emerge from the program. Those large non-disadvantaged firms, seeking entry into a particular government field of contracting, can find no easier way than buying out the stock of a firm well provisioned with sole source contracts.

It is important to address this area both to restore public confidence in the program and to ensure that the purpose of the program—to establish competitive small businesses owned by the disadvantaged—is realized. The 8(a) program should not become a menu from which large business can select its next takeover target.

The Committee is concerned, in addition, that the criminal penalties for those misrepresenting their status in order to obtain a contract or subcontract subject to the provisions of the Small Business Act may not be sufficiently high to deter the proscribed activity. Accordingly, legislation needs to be enacted that would increase both the fines and jail terms associated with "front" companies. Not only do these activities destroy the integrity of the program effort, but they also serve to rob legitimate small and small disadvantaged businesses of benefits intended for them by the Congress.

In order to expand its investigative capabilities, the Committee may ask other entities, such as the General Accounting Office and SBA, to investigate matters for it. However, SBA has been slow, historically, to respond to requests for investigations, especially in the area of the 8(a) program. In addition, investigations have not been as complete or as accurate as the Committee has a right to expect.

One final effort in this area is needed to promote public confidence. Political appointees are not protected by the various "whistle-blower" civil service laws and regulations. Moreover, since their appointments are based on both qualifications and political considerations, it is perceived by the public that the actions of such appointees with respect to contract awards can be and is politically directed. Qualification should be the only criteria for selection in order that we have access to the widest pool of management talent and avoid the recurrence of situations where political connections supplanted management expertise in the selection of top program officials.

In addition, history has demonstrated that inept managers who are political appointees may be more difficult to remove from office. A political appointee, by definition, is supported by political forces and if that political strength is stronger than that of the appointee's supervisor, there is little chance that the appointee will be removed or reassigned.

It is therefore, necessary to remove the program, in so far as practicable, from political consideration or influence. In order to do this, it is necessary to enact provisions dealing with the career status of the persons who manage the program.

SEC. 17. "NON-MANUFACTURER" RULE

The Walsh-Healey Public Contracts Act (41 U.S.C. sec. 35–45), requires all government contracts (including small business set-asides and section 8(a) contracts) for equipment, materials, or supplies be awarded to manufacturers or regular dealers in the articles to be supplied. This provision is intended to eliminate "bid brokers" and to insure that employees who supply government contracts are protected by the fair labor laws.

SBA regulations, however, also require that only end products of a domestic small business may be supplied under 8(a) or small business set-aside contracts calling for other than construction or services. The intent of this so-called "non-manufacturer" rule is to protect small business manufacturers.

A problem arises, however, in the case of end products for which there are no small business manufacturers or processors participating in the federal market. As an example, there are virtually no small petroleum refiners in many marketing areas where the government buys fuel oil. Oil wholesalers that have no access to products processed by small business refiners are thereby prevented from performing 8(a) or set-aside contracts for such requirements. Other examples the Committee has been made aware of include computer equipment, software, books, and several other products where the government specifies what it wants to purchase and there are no small manufacturers of that end product.

As a practical result, there can be no small set-asides nor 8(a) contracts for such products unless the non-manufacturer rule is waived. Indeed, the maintenance of such a rule when there are no small business manufacturers to protect appears to be totally illogical.

An exception to the "non-manufacturer" rule is needed to permit products of any domestic manufacturer to be supplied if there are no small business manufacturers participating in the Federal market.

SEC. 18. SUBCONTRACTING PLANS

Section 211 of P.L. 95–507 amended section 8(d) of the Small Business Act to require that most contracts and subcontracts in excess of $500,000, ($1 million in the case of construction contracts) with subcontracting possibilities, include plans that establish percentage goals for the maximum practicable utilization of small and small disadvantaged business concerns as subcontractors. The subcontracting plan is a material part of the contract to which it pertains. For some time the Committee has been monitoring compliance with section 211 and has become deeply concerned with an apparent disregard on the part of many contracting officers for this important program.

Utilization of small and disadvantaged business concerns as both prime contractors and as subcontractors is a goal of primary importance to Congress. The Committee is not satisfied with present efforts being made by government agencies in monitoring compliance with the subcontracting provisions or in setting and reaching subcontracting goals.

Committee investigations have uncovered many instances of noncompliance with section 211 subcontracting provisions. Many contracts lack required plans; many plans are seriously defective or have unacceptable goals; and many contractors have adopted plans but make no effort to reach their goals. After reviewing the subcontracting programs of several buying activities it appears to the Committee that the law contained in section 211 relating to subcontracting, in many instances, is not taken very seriously. The Small Business Act provides that failure of any contractor or subcontractor to comply in good faith with the subcontracting requirement shall be a material breach of such contract or subcontract. The Committee, however, could find no instance in which an agency took action against a prime contractor for breach of the subcontracting requirement.

Statistics obtained from SBA for FY '86 indicate that out of $61.9 billion subcontracted out by government prime contractors subject to section 211, 39.3 percent was subcontracted to small business and only 1.6 percent was subcontracted to small disadvantaged business. It is our opinion that these percentages do not reflect maximum practicable participation nor do they constitute an acceptable level of achievement. Morevoer, without additional action on the part of Congress the achievement level is not likely to increase at an acceptable rate.

Although section 211 has undoubtedly made an important contribution to subcontracting levels achieved thus far, a greater atten-

tion to compliance is desired. Agencies have the authority to include incentive clauses in government contracts to reward signficiant efforts on the part of the prime contractor to meet and exceed subcontracting goals. According to information available to the Committee, however, such clauses are used rarely by most agencies, or not at all. This fact is further evidence that attempts to increase subcontracting goals for small and small disadvantaged business participation are feeble at best. In fact, in some cases when incentive clauses have been used, a few prime contractors have set goals artificially low in order to meet them with little effort and reap the benefits of the incentive program.

A recent review of three government agencies, the General Services Administration, the Department of Energy, and the Department of the Navy, conducted by the General Accounting Office at the request of the Committee, to assess how these agencies administer the law's subcontracting provisions, merely confirms the Committee's fears. It is clear that additional and more specific sanctions are needed. Without further statutory authority as an indication of Congressional concern, little change can be expected. Failure to expend reasonable efforts to meet and exceed subcontracting goals robs the Government of the benefit of its bargain and robs the economy of the benefits to be gained by increasing the numbers of small and disadvantaged businesses available as sources of supply for government needs and requirements.

SEC. 19. RELATIONSHIP WITH OTHER PROCUREMENT PROGRAMS

Section 1207 of Public Law 99-661, the National Defense Authorization Act for FY 1987, contains a five (5) percent procurement goal for each of fiscal year 1987, 1988 and 1989 for the benefit of small disadvantaged businesses (as defined pursuant to section 8(d) of the Small Business Act), historically Black colleges, and other minority educational institutions. In order to reach this goal, the Secretary of Defense is authorized to contract for management and technical assistance, provide advance payments, pay a 10 percent price differential, and award contracts to small disadvantaged businesses through less than full and open competition. Criminal penalties are provided for misrepresenting parties, and DoD is required to submit various reports on its activities under section 1207.

Interim regulations implementing section 1207 were issued on May 4, 1987. The regulations, basically, direct contracting officers (COs) to set aside a contract for exclusive competition among small disadvantaged business (SDB) concerns if the CO has a reasonable expectation that offers can be anticipated from two or more responsible SDB's and that the contract award price will not exceed the fair market price by more than 10 percent. Section 1207 set-asides, in the regulations, were given priority over all small business set-asides and 8(a) contracts (except for follow-on contracts to incumbent 8(a) firms).

By memorandum dated September 25, 1987 the Office of the Secretary of Defense attempted to clarify the interim regulations. That memorandum stated, in relevant part, that:

> As a matter of Department policy, requirements currently in the 8(a) Program are to remain in the 8(a) Program if a responsible 8(a) firm is available to perform the requirement. It is, of course, axiomatic that both 8(a) and SDB awards are creditable toward the five percent goal. If, after consultation with the Small Business Administration, a determination is made that there is no responsible 8(a) firm available, the requirement should be considered for award under the Small Disadvantaged Business Set-Aside Program. Other requirements requested for the 8(a) Program are to be evaluated and a decision made in accordance with FAR 19.804, prior to consideration of the requirement for the Small Disadvantaged Business Set-Aside Program.

It should also be noted that the DoD has been highly responsive to expressions of concern from the Congress relating to the implementation of section 1207. And while final regulations may well include the policy statement cited above, the Committee has received complaints that:

> (1) Section 1207 has been used to "raid" requirements from both the section 8(a) program and the small business set-aside program; and
>
> (2) Section 1207 has been used as a "club" during 8(a) contract negotiations—the contractor is told to either lower its price or face the possibility that the contract will be removed from the 8(a) program and awarded as a SDB set-aside.

While the Committee has confidence that DoD will exercise its discretion in an appropriate fashion to correct these problems, we do not believe that the relative priorities of these programs should, as a matter of policy, be an issue that rests within the administrative discretion of the Department. Consequently, Congress needs to define the relationship between all of these programs.

In addition, the Committee realizes that section 1207 was intended to affect market share in an immediate and demonstrable fashion. It is not intended to be a business development program such as 8(a). In fact, since the section 1207 set-asides are competitive, they provide a good transition program for graduating 8(a) firms. However, the Committee is advised that a number of graduated 8(a) firms have exceeded the small business size standard due to 8(a) awards that they are no longer entitled to receive since they have exited the program. Consequently, the potential use of section 1207 as a transitional program for 8(a) firms is thwarted by the way that SBA presently computes size.

Accordingly, the issue of expanding the size eligibility for disadvantaged firms that desire to participate in the section 1207 program should be addressed.

SEC. 20. STANDARD INDUSTRIAL CLASSIFICATION CODE LIMITATIONS

According to SBA regulations (13 C.F.R. sec. 124.207) 8(a) firms may only receive 8(a) contracts that are designated to be in pre-approved standard industrial classification (SIC) codes. The regulations permit only one primary SIC, but do allow the designation of

other "related" SICs. The regulations contain no definition of what is intended by the term "related".

The Committee has received complaints that SBA unreasonably restrains the growth of 8(a) concerns into additional SIC areas. In fact, SBA's Standard Operating Procedure seems to preclude the addition of any new SIC that would cross division classifications. For example, a manufacturing concern could add another manufacturing SIC, but would be prevented from adding a wholesaling SIC.

The Committee believes that SBA may be overly restrictive in this regard. To illustrate, a logical business progression may, very likely, proceed along the following path:

A wholesaler of computer equipment and software may eventually elect to service some of the hardware it is selling to the government. As the firm grows and becomes more sophisticated, it may develop the capacity to modify or manufacture some of the equipment it sells. This hypothethical firm has progressed, in a logical fashion, from wholesaling, to servicing and, finally, to manufacturing. All of this activity has been related to a common family of products and, perhaps, even to common customers.

The Committee, therefore, has concluded that more flexibility needs to be exercised in approving SIC codes in order to afford the 8(a) firm a reasonable opportunity to develop.

SEC. 21. DIRECTORS OF SMALL AND DISADVANTAGED BUSINESS UTILIZATION

Section 15(k) of the Small Business Act establishes in each Federal agency having procurement powers an Office of Small and Disadvantaged Business Utilization (OSDBU) appointed by the head of the agency. This section also sets out the Director's duties and responsibilities. The SADBU Director is responsible for implementing and executing functions and duties relating to section 8(a) and section 15 set-asides, and is given supervisory authority over personnel to the extent that the functions and duties of such personnel relate to these programs.

The Director is responsible to and is required to report directly to the agency head or deputy. This direct reporting responsibility was intended to give the Director immediate access to top level policymakers and thus maximize his or her effectiveness as an advocate of small and small disadvantaged business. In the past, it was found that officials with the responsibilities for small and small disadvantaged business participation in agency procurement activities often did not hold positions at a level high enough to be effective.

The National Defense Authorization Act for FY 1987 (P.L. 99–661) created a new position of Under Secretary of Defense for Acquisition who would direct all other offices in the Office of the Secretary of Defense who have acquisition responsibilities including the OSDBU Director. Section 902 of that Act specifically amended subsection 15(k) of the Small Business Act to achieve this result.

P.L. 99–661, therefore, creates a situation in which the OSDBU Director at the Office of the Secretary of Defense, (OSD) unlike his or her counterparts at all other agencies, occupies a position inferior to that intended in the original small business law that estab-

lished the office. Moreover, it appears totally ineffectual to have the OSD Director report to and be evaluated by an individual wielding responsibilities that the Director was intended to monitor.

Without the appropriate status granted to the Director by the Small Business Act, persons holding this responsibility may again be relegated to remote corridors of agency office buildings and denied meaningful opportunities to affect policies and procedures. The Committee feels strongly that the original status of the Director of the OSDBU should be restored to prevent the inevitable downgrading of the position.

In addition, since the Directors are presently charged by law to manage the small and small disadvantaged business programs in their agencies, the Committee believes it appropriate and necessary to afford some specific recognition to the recommendations of such Directors with respect to the distribution of awards among the small business set-aside, 8(a) and section 1207 programs.

SEC. 22. REGULATIONS

This reform bill would provide for a major overhaul of the 8(a) program. The nature of the program, however, will depend, in large part, on the regulations that implement the provisions of the Act. Those regulations will directly affect the thousands of present 8(a) concerns and many more future 8(a) companies. In order to insure that the regulations appropriately reflect the intentions of Congress, and considering the potential ramifications that the regulations may have, the Committee believes that there is a critical need to provide Congress and the public with ample opportunity to contribute to their formulation.

Based on past SBA actions with regard to the promulgation of regulations for the 8(a) program, the Committee believes there is a need for a detailed statutory provision on this issue. In 1983, SBA published regulations for the 8(a) program which were highly controversial. Yet the Administration decided to publish the regulations during the last week of December, at a period of time when the holidays serve to limit public attention to such matters, and to have a comment period of only thirty days. To avoid a similar approach to the implementation of the regulations for this bill, SBA should be prohibited from publishing final regulations for a specified period of time. There is also a need for SBA to convene public meetings and to publish proposed regulations so that they can be scrutinized prior to final publication.

SEC. 23. EMPLOYEE TRAINING AND EDUCATION

At the present time, the functions of the Capital Ownership Development Program are generally split between contract Specialists (for the purpose of this report the terms "contract specialists" and "contract negotiators" are treated interchangeably) and Business Opportunity Specialists (BOSs).

According to the SBA's Standard Operating Procedure (SOP) a BOS has the following major responsibilites:

> The Primary responsibility of the Business Opportunity Specialist (BOS) is to implement and monitor the 8(a) program so as to assist in the strengthening and growth of

> manufacturing, construction, and service enterprises owned and operated by disadvantaged individuals through direct management, marketing, financial, procurement and technical assistance and counselling. The BOS is responsible for addressing difficult industry-wide problems and evaluating the total effectiveness and impact of the program, its limitations and any redirection it should take.

The SOP defines the significant activities of a contract specialist in the following way:

> The contract specialist is responsible for carrying out activities in connection with negotiation, execution, follow-up, and maintenance of all documentation pertaining to contract and subcontract awards. Activities shall include negotiation of prices with procuring activities and participating firms; review of prime contract documents and work related to assignment of subcontracts; and determination, in cooperation with the Business Opportunity Specialist, whether the eligible small business firm has the capability to fulfill subcontract needs.

The Committee believes that it is inappropriate to "split" program functions between BOSs and Contract Specialists. The purpose of the 8(a) contract authority is to contribute to the business development purposes of the Capital Ownership Development Program. Section 8(a) contracts are a valid exercise of the agency's authority only if they relate to the achievement or furtherance of that purpose. To have one group of employees—BOSs—responsible for business development, and another group of employees—Contract Specialists—responsible for contract negotiations, is illogical since contract awards are integral to the developmental effort and cannot be considered a separate function.

The Committee, therefore, believes that there exists a need to merge these two positions into one. The person who is responsible for business development should be responsible for contract negotiations.

The Committee notes, further, that there exists a continuing need to train SBA personnel in business development techniques so that they may better assist 8(a) firms and achieve their full career potential. In this regard, it should also be noted that SBA needs to develop a "team approach" to progrm delivery so that the BOS has access to and can leverage the expertise of other employees at the district office level.

The Committee has also concluded that there is a maldistribution of employees in the various regions assigned minority business functions. For example, in Region IX (Arizona, California, Hawaii and Nevada) there is one BOS for each 56 firms, while in Region VII (Missouri, Iowa, Nebraska and Kansas) there is one BOS for every 10 firms. The situation with contract specialists (and negotiators) is even worse—Region IX has one negotiator for each 30 contractors while Region IV has only one negotiator for its portfolio of 367 firms. While it is obvious that some BOSs must have received contract warrants to handle the work-load, it is equally apparent that the situation is confused and that personnel are not assigned in equable proportion to the numbers in the portfolio.

EXHIBIT 3.—STAFFING ANALYSIS (WITH MERGER OF CONTRACT NEGOTIATOR POSITION AND CONTRACT SPECIALIST POSITIONS)

[As of June 4, 1987]

Region	No. of BOS's	Number of contract negotiator	Number of 8(a) firms	Firms per BOS	Firms per contract negotiator
I	4	1	66	16	66
II	17	3	293	17	97
III	21	7	809	38	115
IV	11	4	342	31	85
V	14	8	303	21	37
VI	16	1	367	22	367
VII	10	0	107	10	0
VIII	7	1	129	18	129
IX	7	13	393	56	30
X	5	5	152	30	30
Total	112	43	2961	205	956

Finally, the Committee believes that the performance evaluation system applicable to individuals working in the 8(a) program needs to reflect more precisely the purposes of the program. To the extent practicable, uniform performance standards related to the business development of the assigned portfolio need to be considered. It is the intention of the Committee, further, that only qualified and well trained personnel be allowed to administer the program.

SEC. 24. MISCELLANEOUS AND TECHNICAL PROVISIONS

SEC. 7(j)(8) of the Small Business Act gives standing authority to the Comptroller General to issue reports to Congress on the programs and activities conducted under the authorities of section 7(i), 7(j) and 8(a). The first such report was due on January 1, 1981, and subsequent reports were due "at any time thereafter at the discretion of the Comptroller General."

Due to the fact alone that the program now accounts for well over $3 billion a year in contracts, the Committee believes it necessary to require more formalized and routine reporting. However, the Committee also notes that this bill, if enacted, would significantly shift emphasis to business development efforts and believes it necessary to monitor SBA carefully to insure that this intent is carried out.

While Committee believes that the introduction of competition into the program is necessary, it is concerned that such provisions would have severely negative consequences on businesses owned by Indian tribes because of their unique status. Such businesses are located on reservations and account for the major employment of the work force, and other employment opportunities are either extremely removed or totally inaccessable to the reservation.

In addition, such firms often incur higher costs and risks than non-reservation businesses. Tribal property on the reservation cannot be collateralized due to the unique trust relationship with the Federal government and the sovereignty of the tribe. The

shortage of capital makes impossible the buying of raw materials in quantity to achieve economies and often necessitates the expensive leasing or renting of equipment rather than a purchase which may be amortized over a number of different jobs. For a variety of cultural reasons, labor and training costs may also be higher and access to skilled management may be more limited.

For all of these reasons, the Committee believes that it is necessary to accommodate the unique needs of tribally owned 8(a) concerns.

It is also necessary to make one further accommodation with respect to competition in the 8(a) program. The Committee is advised that the SBA has already conducted a price competition among two 8(a) firms for a repetitive requirement let by the Navy. This initiative has worked well and the Committee believes it necessary to specify clearly in the bill that none of the new 8(a) programmatic changes should affect that competition.

Finally, the Committee has become aware of problems surrounding the use of unpriced options in section 8(a) contracts. Option clauses are frequently included in government contracts. These clauses permit the government to elect to purchase additional quantities of supplies or services or extend the original period of contract performance. In the 8(a) program, the government has permitted the use of such contract options without price determinations.

In April, 1986, the General Accounting Office (GAO) issued a report that questions the validity and enforceability of unpriced options. In response to this opinion, the SBA, on October 2, 1987, issued a directive to Regional Administrators restricting the exercise of unpriced options. As a result of the SBA directive, many graduated firms may lose valuable contract options for which they have made significant investments. Many of these firms were told during contract negotiations that there was no need to price the options. However, under the present SBA interpretation, if the option is not priced it must, in effect, be treated as a sole source contract and cannot be awarded unless a sole source justification exists (see 48 C.F.R. Part 6). For graduated firms and those that have exceeded the size standard, section 8(a) cannot be cited as an authority since under that section SBA may contract only with small disadvantaged businesses that are in the program. Consequently, legislation is needed to prevent an injustice to firms that reasonably relied upon representations made to them by the government.

SEC. 25. AUTHORIZATION

Although most provisions of the bill would become effective one year after the date of enactment, several provisions regarding training, the hire of new personnel, and public meetings would become effective on the date of enactment. Since the Congress has already enacted authorization for all of SBA's programs through fiscal year 1988 (P.L. 99–272), it is necessary to provide authorization for FY 1988 in the event the bill would be signed into law this fiscal year.

SEC. 26. EFFECTIVE DATES

While most provisions of the bill would become effective one year after the date of enactment there is a need to make certain sections of the bill effective upon date of enactment of address immediate problems.

For example, many firms will exit the 8(a) program during the year between the date of enactment and the effective date unless the Congress provides for an immediate "grandfather" provision for these program participants (see section 5).

Other issues that demand immediate attention related to fair market prices on 8(a) contracts (section 12); the relationship between small business set-asides, section 8(a) awards, and set-asides made pursuant to section 1207 of P.L. 99–661 (section 19); SBA limitations on industrial areas in which 8(a) firms may receive contract support (section 20); the responsibilities of Directors of Small and Disadvantaged Business Utilization (section 21); the public notice and participation requirements that must be met before SBA can issue regulations to implement this bill (section 22); and the training of SBA employees that will implement the new law (section 23).

Most other provisions will become effective one year after the date of enactment in recognition of the extensive programmatic and administrative changes necessitated by the bill.

SEC. 27. REVIEW OF COMPETITIVE THRESHOLDS

While the Committee believes that the requirement for competition among 8(a) firms for limited amounts of 8(a) contracts will be beneficial for the program and program participants, it realizes that such a new policy could cause unintended consequences in relation to some details of the program. The Committee considered several approaches for incorporating competition into the programs and decided to establish competitive thresholds. Before doing so, the Committee undertook an intensive analysis of the potential impact that such thresholds might have on the program. Due to a lack of detailed data regarding the scope and distribution of options in the 8(a) program, the Committee recoginzes that the impact of thresholds may not be totally predictable particularly for service industries.

Annual reviews of competitive thresholds are needed, therefore, to insure that their implementation and effect are carefully monitored.

What the Bill Would Do

SEC. 2. FINDINGS AND PURPOSES

The bill would set our clear expressions of Congressional findings and the purposes for this reform measure.

The Congress would find that the Capital Ownership Development Program and the authority to let section 8(a) contracts are intended to help socially and economically disadvantaged individuals enter the mainstream of the American economy; that while some progress has been realized, the program has failed to met its objectives—which continue to be valid; that the SBA and some 8(a) firms have given insufficient attention to business development

and have, instead, focused almost exclusively on contract awards or the numbers of firms that have cycled through the program; and that it is necessary to reform substantially the program and to provide for competition within the program in order to achieve the Congressionally mandated business development purposes of the program.

The section would then recite the three principal purposes for the bill:

(1) To affirm that the Capital Ownership Development Program and the section 8(a) authority is to be used exclusively for business development purposes to help disadvantaged firms compete on an equal basis in the mainstream of the economy;

(2) To affirm that the measure of program success is the number of competitive firms that leave the program without becoming overly reliant on 8(a) contracts; and

(3) To insure that program benefits accrue to individuals who are both socially and economically disadvantaged.

It is the Committee's intent that the authorities given by this bill will be used to change dramatically the program emphasis to business development. To the extent possible, the Committee expects SBA to change its measures of program success to be consistent with the purposes recited in this section, and to conform its actions, both programmatic and administrative, to achieve those purposes.

SEC. 3. BUSINESS DEVELOPMENT OBJECTIVES

The bill amends section 2 of the Small Business Act to clarify the purposes and objectives of the Capital Ownership Development Program established by sections 7(j) and 8(a). The clarifying language emphasizes business development as the primary purpose of the program as well as business ownership, so that, upon program completion, participating small business concerns can compete on an equal basis with concerns that are not owned by socially and economically disadvantaged individuals.

The firm's performance upon program completion should be the ultimate measurement of the program's success. The language contained in this section is intended to make that point in the strongest, most unequivocal fashion possible.

SEC. 4. REQUIREMENTS OF THE CAPITAL OWNERSHIP DEVELOPMENT PROGRAM

Subsection (a) would require that the Capital Ownership Development Program assist participating firms to develop comprehensive business plans with specific business targets, objectives and goals that are realistic, and within the capability of both the firms and SBA. These measures should be designed so that, if achieved, the firm would overcome its economic disadvantage and be competitive in its market. By the term "business development" the Committee does not intend that the program should guarantee success, but rather the firms be afforded a fair opportunity to succeed.

The Committee intends that SBA substantially revise or eliminate its present business plan forms and substitute for them meaningful plans that are better directed toward achieving the purposes of the program. The Committee suggests that the new business plan forms contain targets, objectives, and goals in each area of finance, marketing, and management that the firm needs in order to become competitive in its market.

Of course, 8(a) support levels, and the goals for non-8(a) awards (see section 15) should form an important part of the marketing goals. But other goals in this area could, appropriately, include written marketing plans that identify and segment targeted market areas and strategies to access such areas.

Financial goals could appropriately include the attainment of certain financial ratios that represent the average of all other similar small businesses in the market area. Such compilations are readily available and used routinely by banks and other lending institutions to assess the credit risk associated with potential borrowers.

Management measures could justifiably include an analysis of how well the firm plans, organizes, staffs, directs, and controls each of its major functions.

The point made by the subsection is that unless SBA knows and can define what a successful firm "looks like," it has no logical way to measure the success of its program, or to make informed decisions about resource allocation, or to make valid graduation and termination decisions based upon efforts to become competitive.

Once these measures are decided upon, the Committee expects that SBA, in conjunction with the 8(a) firm, will identify the weaknesses of each firm and formulate a specific plan of action to address those noted weaknesses. The agency should employ a "team approach" in this regard, directing loan officers and business development specialists to work with the appropriate business opportunity specialists to formulate these plans of action.

Finally, progress against the targets, objectives and goals needs to be measured, and both failing performance and exceptional performance identified. Review and feedback is vital to any organization so that successful performance can be repeated and reinforced, while those "things" that have failed can be changed and, thereby, improved.

Subsection (b) of the section would require that the Capital Ownership Development Program conduct training sessions for 8(a) firms to help them develop business strategies needed to successfully compete for contracts in the non-8(a) marketplace. The Committee notes that such training can be included within and made a part of the plan of action each firm should have to overcome its noted weaknesses as identified in the overall business plan.

Finally, if the business plans are properly formulated, and the measures of performance properly computed, SBA should be in a position to assess the overall deficiencies of its entire portfolio of firms. The available training dollars could be targeted, therefore, to those business areas where most firms have been identifed as having a common need.

SEC. 5. EFFECT ON PRESENT PROGRAM PARTICIPANTS

In fairness to firms that will not have completed their 8(a) participation terms by the time this bill takes effect, this section would provide for their transition into the new program. The bill allows any firm that is in the 8(a) program as of the date of enactment, to participate in the new program for up to nine years, (less the number of years since the award of its first 8(a) contract), or until the completion of its original fixed program participation term (FPPT), plus any extension, whichever is greater.

SEC. 6. TERMINATION AND GRADUATION STANDARDS

The bill would codify and clarify present SBA regulation by declaring that there are four ways to exit the program: (1) voluntary withdrawal; (2) expiration of the nine (9) year maximum timeframe; (3) termination; and (4) graduation.

Termination is defined as the total denial or suspension of assistance under 7(j)(10) or section 8(a) prior to graduation or the expiration of the nine year maximum timeframe. This definition is intended to cover those circumstances when SBA denies all assistance to a firm under 7(j)(10) or 8(a) for whatever reason.

An action for termination must be based upon "good cause". The term "good cause" includes the following three (3) types of situations: (1) the failure to maintain a standard of program eligibility; (2) the violation of a legal requirement regarding prohibited actions or the reporting of data; or (3) the failure or inability to engage in business practices that will promote competitiveness within a reasonable period of time. Present SBA regulations list 25 examples of "good cause". It is strongly suggested by the Committee that each of the 25 examples can be included under the three specific situations mentioned in the bill. Therefore, it would be expected that the SBA would conform and simplify its regulations appearing at 13 C.F.R. sec. 124.112.

The bill would also define "graduation" to mean the removal of a concern from the program due to the substantial achievement of the targets, objectives and goals contained in the business plan and its demonstrated ability to compete in the marketplace without 7(j)(10) or 8(a) assistance.

SEC. 7. STAGES OF PROGRAM PARTICIPATION

This section would require SBA to divide the Capital Ownership Development Program into three different stages: a developmental stage; a transitional stage; and a mainstreaming stage.

The developmental stage is to be designed to assist the firm overcome its economic disadvantage by providing the types of assistance needed to access its markets and to strengthen its financial and managerial skills. Firms in this stage, if otherwise eligible, would be qualified to receive:

(1) The award of 8(a) contracts.

(2) Two exemptions from the provisions of the Walsh-Healey Act that may be used solely with respect to 8(a) contracts and which shall be used only to allow for contingent arrangements by the concern to acquire the machinery, equipment, facilities, or labor needed to perform such contracts.

(3) Two exemptions from the bonding provisions of the Miller Act that may be applied to 8(a) contracts only under the following circumstances:

(a) The Administration takes appropriate steps to protect material suppliers and workers;

(b) The Administration assists the firm to develop its bonding capacity; and

(c) The Administration finds that bonding is not available even with an SBA guarantee under the Surety Bond Guarantee Program.

(4) The transfer of government-owned technology and surplus property by grant, license or sale. However, the transferred property must be used by the 8(a) concern and cannot be sold or transferred to any other party (other than the Government) during the firm's term in the program and for a period of one year thereafter.

(5) Job Training Assistance. Under this provision SBA may purchase skills training or upgrading for the employees or potential employees of 8(a) concerns. A training provider must be an institution of higher education, a community or vocational college, or an institution eligible to provide skills training or upgrading under the Job Training Partnership Act. The SBA, in consultation with the Secretary of Labor, is to promulgate rules and regulations that provide training standards and audit requirements. It is the intent of the Committee that this authority be used primarily to train or upgrade professional and technical skills and those skills related to the formulation or application of new technologies. In addition to these requirements, no job training assistance is to be provided unless the Administrator determines (although the Administrator may delegate the responsibility to make these findings to some other appropriate individual within the employ of SBA) that the following conditions exist:

(a) The applicant concern has documented that it has first explored the use of cost-free or cost-subsidized training programs. This criteria would be satisfied if SBA determined that such available training programs did not adequately address the needs of the firms:

(b) No more than five (5) present or potential employees of the applicant are being trained at any one time;

(c) No more than $2,500 may be made available for any one employee or potential employee;

(d) The length of the training or upgrading is to be not less than one month nor more than six months. It is not the intent of the Committee that the training must encompass forty work hours every week. SBA should determine, on an administrative basis and after consultation with the Department of Labor, how much actual training needs to be provided during any given week to constitute compliance with this requirement. The Committee wishes only to ensure that the training is consistently imparted in a rational way according to an approved schedule over the specified time frame;

(e) Such concern has given adequate assurance that it will employ the trainee for at least six (6) months after the training has been completed and the trainee has given a similar assurance that he/she will remain within the employ of the firm for such six month period. A breach of this agreement would entitle SBA to obtain from the violating party the repayment of all funds expended on behalf of the violating party. The repayment is to be made with interest and such costs of collection as may be reasonable. In addition, the violating party would be barred from receiving any further job training benefits under this provision;

(f) The training will take place at the concern's facilities or at those of the training provider; and

(g) The concern will maintain such records as SBA deems appropriate to ensure that the requirements of this subsection and other laws will not be violated.

The transitional stage of program participation is to be designed to overcome, insofar as practicable, the remaining elements of economic disadvantage and to start preparing the firm for graduation from the program.

A firm in this stage, if otherwise eligible, would be qualified to receive:

(1) The award of 8(a) contracts.

(2) The transfer of technology and surplus property (see above).

(3) Financial assistance. This section would create two new loan programs for the exclusive benefit of 8(a) concerns in lieu of business development expense (BDE) grants. The guarantee program would provide an 85 percent guarantee and the government's exposure would be limited to $500,000. Direct and immediate participation loans will be made at an interest rate that does not exceed the cost of money to the government and may carry a term of up to 25 years. A direct loan may not exceed $500,000 and cannot be made unless it is shown that a guaranteed loan or an immediate participation loan is not available. A direct loan is to be secured, but must be subordinated by its terms to all other borrowings of the issuer. Before either a guarantee or a direct loan is made, SBA must determine that: (1) the financing is not available from other non-federal sources; (2) with such assistance the concern has a reasonable prospect for success; (3) the proceeds of the loan will be used to acquire "hard assets", such as plant, equipment and material, or will be used as working capital in manufacturing concerns; and (4) such assistance will be of such sound value as to reasonably assure that the concern will fulfill the terms of the loan agreement. Finally, a new revolving fund would be set up in the Treasury Department to finance these loan programs. BDE funds not previously committed would be transferred to the fund and such additional amounts as may be needed for the new programs are authorized to be appropriated.

(4) Anti-trust exemption. The section provides for anti-trust exemptions for a joint venture agreement between an 8(a) firm

and any other business concern, provided that prior written approval of the venture is received from the Attorney General and the SBA Administrator. Small business status is not forfeited solely because an 8(a) concern is a party to the joint venture agreement. The joint venture formulated under this provision is eligible for contracts under the programs authorized by the Small Business Act *only* if it is otherwise eligible in the absence of this provision, that is, the joint venture must meet the eligibility requirements of each program under which contracts are sought. Joint venture agreements approved under this provision may not be in effect for a period of time longer than a concern's remaining time in the program, measured from the effective date of the agreement, plus an additional period of three years.

The mainstreaming stage of program participation is to be designed to incorporate 8(a) participants into the mainstream economy with the maximum practicable opportunity to become fully competitive.

In this last stage of program participation 8(a) firms, if otherwise eligible, would be qualified to receive:

(1) The award of 8(a) contracts.

(2) The transfer of technology and surplus property (see above).

(3) Financial assistance (see above).

(4) Such other management and technical assistance that SBA may deem appropriate.

The Committee believes that concerns in the last stage of program participation need to be provided more sophisticated types of assistance than that which may be otherwise available to less mature firms. Consequently, SBA is given wide latitude to develop efforts especially designed for this group or class of firms, and it is expected that the agency will explore all innovative ways, as well as traditional methods, to assist this group. The Committee fully expects SBA to establish a formalized effort to accomplish this task.

For example, the Committee suggests exploring the possibility of international trade assistance, helping firms locate sources of equity capital, and promoting teaming agreements and "leader-follower" contracts pertaining to the design and production of major systems, as well as, exploring more formalized subcontracting efforts pursuant to section 211 of P.L. 95-507. The Committee also urges SBA to elicit the help of 8(a) graduates to promote the development of the firms in the program. These relationships may well prove beneficial to both types of firms.

Extensive business development authority has been given to SBA under this section and the Committee expects that the agency will fully utilize its power to help firms become more competitive. SBA is expected to take all administrative actions necessary and appropriate to utilize fully the new grants of business development authority provided for by this section. The agency's failure to move forward expeditiously will result in the immediate consideration of remedial legislative measures that would restrict the future exercise of its discretion.

SEC. 8. TIME LIMITATIONS

The bill would repeal the current system of varying Fixed Program Participation Terms (FPPTs) and would establish a more certain period of program participation. Firms are generally entitled to a fixed program term of nine years, from date of certification, divided into three stages. The first 4 years of the program comprise the development stage; years 5 through 7 form the transitional stage; and years 8 and 9 make up the mainstreaming stage.

Under this approach, firms will know exactly how much time they have in the program and all firms will be treated equally. SBA will be able to spend more time providing business developmental assistance to its 8(a) portfolio, since it no longer must compute a FPPT and an extension for every 8(a) concern. By establishing three stages of development, program terms will reflect the progressive advancement of firms throughout their participation in the program.

The bill would also provide an additional two years of program participation for all 8(a) companies above the maximum seven years now provided for by regulations. However, since most firms receive an average of slightly more than six (6) years, the bill, in effect, provides for three (3) years over current limitation.

Designation of an appropriate program term is difficult. Certainly, the Committee desires to provide sufficient time for program participants to develop into viable, mainstream businesses. However, the longer the term, the fewer opportunities there will be for new firms to enter the program. The Committee has decided to establish a nine year participation term because it believes that nine years is long enough for firms to receive adequate program assistance, yet short enough to allow for a reasonable turnover of participants.

The probability is that firms that cannot be successful after receiving nine years of intensive management, technical, financial and contract assistance will likely never achieve a competitive status. It would be unfair to present program participants with the potential to succeed and aspiring program applicants to have the program cluttered with firms that are consuming resources without demonstrating an ability to be competitive. While all firms deserve a chance to succeed, the Committee appreciates the fact that the longer the term of participation, the fewer firms will be able to participate. Obviously, an equitable balance must be struck between these competing interests and the Committee believes it appropriate and fair to all parties to set that mark at nine years.

SEC. 9. DATA COLLECTION

The bill would require SBA to develop and maintain a data collection system for the 8(a) program. It also requires the Administration to report annually to Congress on the operations of the program. Such reports must include at least the following:

(1) The average net worth of the owners of firms certified for the 8(a) program during the preceding fiscal year, and the distribution of individual net worth by $50,000 increments. The first report must include a similar distribution of the net worth of all individual 8(a) company owners who are partici-

pating in the program as of the effective date of this provision. The purpose of the requirement is to guarantee that only individuals who are economically disadvantaged are participating in the 8(a) programs.

(2) A description and estimate of the benefits and costs that have accrued to the economy and the government during the preceding fiscal year as a result of the operations of the businesses that were performing 8(a) work. The assessment of benefits generated by an 8(a) firm should include such variables as the number of employees of the firm; the expenditures made by the firm; all types of taxes paid by the firm; and any revenue saved by the Federal government on the procurements awarded to the firm when compared to previous procurements for similar goods or services. The determinant of costs generated by an 8(a) firm shall include such factors as the costs to SBA for assisting the firm, and any additional costs incurred by the government or society because requirements were fulfilled by the 8(a) firm rather than by another non-8(a) firm. For example, if there is evidence that 8(a) awards were made in excess of the fair market price or that submitted goods were unacceptable and had to be re-procured, all of those dollars and associated costs should be recorded and documented in the report.

(3) A compilation of the businesses that have exited the 8(a) program during the preceding fiscal year. The purpose of the requirement is to determine how 8(a) graduates have fared. More specifically, SBA should determine the number of 8(a) graduates that have ceased or curtailed operations and the reasons why this occurred; the number of concerns that have been acquired by other than socially and economically disadvantaged individuals; and the number of concerns that have continued operations and the benefits and costs, as described in paragraph two above, that have accrued to the economy because of their operations. This data will help determine whether the 8(a) program is accomplishing its objective of developing viable minority-owned firms in the mainstream of the economy.

(4) A listing of all participants in the 8(a) program during the preceding year by region, identifying the name of the concern; the race or ethnicity and gender of the principal owners; the dollar value of all contracts received in the preceding year; the name of the awarding agency for each such contract; the dollar amount of advance payments received by each concern; and a description and estimate, if appropriate, of the dollar value of all developmental assistance received by each firm during the year. The purpose of the requirement is to insure that program benefits are being distributed equitably.

(5) The total dollar value of 8(a) contracts and options awarded to each 8(a) firm during the preceding fiscal year and that amount expressed as a percentage of each firm's total sales. This information should be disaggregated by year of program participation for each firm. The purpose of the data is to help insure that firms participating in the 8(a) program do not

become so overly reliant on 8(a) work that they cannot survive after they exit the program.

(6) A description of additional resources and program authorities that are likely to be needed to service the expected 8(a) portfolio of firms over the ensuing two years. The purpose of the requirement is to insure that SBA plans sufficiently in advance to properly service and operate the 8(a) program.

(7) Lastly, the total dollar value of 8(a) contracts and options, broken down by appropriate dollar increments, for each four digit standard industrial classification code under which such contracts and options were classified. This requirement is necessary to determine the impact that competitive thresholds, as established in section 11 of the bill, may have on the 8(a) portfolio. Some information exists on the likely overall effect of these thresholds on the 8(a) program, but it is essential to see how they may affect subclassifications of participating firms. It is also important to determine how contract options affect the distribution of 8(a) contract awards above and below the competitive thresholds.

The first report on the 8(a) program, as described above, is to pertain to fiscal year 1988.

The SBA should also explore the feasibility of establishing a nationwide, central computer listing of all 8(a) firms, their business plans, needs and technical capabilities.

SEC. 10. CONTRACT SELECTION APPEALS AND DOCUMENTATION

Subsection (a) of this section would amend section 8(a)(1)(A) of the Small Business Act to clarify the present authority that SBA has to appeal the negative decisions of contracting officers to reserve identified requirements for use in the 8(a) programs.

Subsection (b) would require that the contracting officer document the appropriate contract file whenever (1) the buying agency fails to award a contract under section 8(a) after negotiations have been commenced; or (2) the agency's contracting officer denies a SBA request that a particular requirement be awarded under section 8(a).

In the opinion of the Committee valid reasons for denying a SBA request for a contract to be used in the program may, in particular circumstances, include—

(1) The failure to receive a fair market price;

(2) Demonstrated lack of technical competency or other element of contractor responsibility;

(3) The need to solicit proposals from the widest range of potential offerors in order to obtain the best scientific or technological approach available; or

(4) Some overriding sole source justification that is otherwise provided for by law.

In no instance should a contract be denied for use in the 8(a) program because of someone's subjective decision that it may be "too large", or "too sophisticated," or that the requirement, when aggregated with other 8(a) awards of the agency, may be "too much" to let the program have in any one year.

The Committee expects that the documentation required under this subsection will include references to one of the four reasons cited, accompanied by strong factual showings. The Committee firmly believes that such documentation must be shown in order to avoid a finding of arbitrary and capricious action on the part of the contracting officer.

SEC. 11. COMPETITIVE THRESHOLDS AND CONTRACT DISTRIBUTION

The bill would require that firms participating in the 8(a) program compete for 8(a) contracts which exceed $2 million (including options) if for construction, manufacturing, services or retail, and $1 million (including options) in all other cases.

Based on information provided to the Committee, such thresholds would result in more than fifty (50) percent of the total value of 8(a) awards being subject to competition. However, less than ten (10) percent of the total number of contracts would be above the thresholds, thereby allowing younger and smaller firms an ample supply of sole source contracts to meet their business development needs.

Options must be included in the computation of the threshold amounts in order to prevent the "gaming" of contract values. For example, in order to avoid competition, a contract could deliberately be made to have very small base period of performance, or a severely restricted quantity, and contain rather large options which, when executed, could run into several millions of dollars. In order to avoid this potential for abuse, all options need to be counted when determining if the threshold has been met.

Although the SBA does not have current data on the dollar value of unexecuted options, the Committee believes that such amounts would not call into question the efficacy of using a $1 million or $2 million threhold. Even though acquisitions in a few industries may contain options (e.g. services) work procured from most industries typically do not.

There must be a reasonable expectation that at least two (2) or more responsible 8(a) concerns will submit offers at fair market prices in order for competition to take place above the threshold levels. (Upon a finding that this rule of two cannot be met, SBA would, in such rate instances, be free to sole source the requirement). SBA and each contracting agency are to develop a simplified procurement method for awarding competitive contracts. But it is the intent of the Committee that this simplified method not be used in a way that would limit the size or sophistication of requirements that can be offered for use in the program.

The bill also mandates that SBA insure, to the maximum extent possible, that contracts below the thresholds are equitably distributed. In FY 1986, the top ten (10) percent of 8(a) firms received over seventy-eight (78) percent of the contract dollars. This, of course, leaves the remaining ninety (90) percent of the firms vying for about twenty (20) percent of what is available. As reported previously, in this struggle, over one-half of the firms are unable to secure any contracts at all.

Sole sourced contracts are to be allocated so that no particular firm becomes excessively reliant on such contracts and that all

firms in similar circumstances are treated equitably. In addition, both competitive and sole sourced 8(a) contracts are to be distributed equitably on the basis of geography, to the maximum extent practicable. SBA is to insure that the allocation of contracts is not regionally biased.

The Committee intends that SBA have wide discretion to implement the competitive program established by this section. It is suggested, however, that SBA reserve to itself the final determination of which firms are "responsible" and otherwise eligible to compete for a particular requirement. These authorities should never be delegated to the buying activity even through such activity may, of course, suggest responsible firms.

Further, it is the Committee's recommendation that the buying agency conduct the actual competition, but that SBA should, in appropriate situations, act as a contracting officer's technical representative so that the agency receives the benefits of SBA's expertise regarding the relative strengths of its 8(a) firms.

The competition under this section may be primarily technical, or based primarily on price and price related factors. The relative weights of the evaluation factors (both technical and price) should be the same under 8(a) as they would be if the requirement were solicited on an unrestricted basis.

It is intended of course, that the 8(a) procurement procedure remain a tripartite arrangement with a prime contract executed between the buying agency and SBA and a subcontract executed between SBA and the 8(a) firm.

Finally, with respect to pre-award protests on competitive 8(a) contracts, it is the opinion of the Committee that SBA lacks the legal authority to delegate its core duties and responsibilities under the Small Business Act to any other agency. These matters would include: determinations as to size; 8(a) eligibility; responsibility of a firm to be included within the pool of eligible offerors; appropriate SIC designations both for the requirement and potential competing firms; and any other similar matter. Other issues normally resolved by the General Accounting Office (GAO) under its "bid" protest authority should be referred to GAO for its decision or recommendation.

The Committee also conducted an analysis of the impact of competitive thresholds on firms according to hundreds of four digit standard industrial classification (SIC) codes. The analysis illustrated that in only a few instances was the percentage of 8(a) contracts falling above the competitive thresholds so high as to likely preclude formative firms from receiving 8(a) support but in those codes there were only one or two contracts awarded each year.

The Committee concluded, therefore, that competitive thresholds would not have an adverse affect on 8(a) companies even when broken down by four digit SIC Codes.

SEC. 12. FAIR MARKET PRICE

This section of the bill would basically codify existing provisions of the Federal Acquisition Regulations (FAR) and establish guidelines for estimating fair market price (FMP) based on "reasonable costs under normal competitive conditions." The agency originating

the requirement selected for the 8(a) program would be required to conduct a cost or pricing analysis. If the requirement is new or does not have a satisfactory procurement history, the agency may consider such factors as commercial prices for similar product or services, current market conditions, and cost or pricing information from other resources including procurement data from other agencies. In all sole source situations, however, the agency would be required to consider relevant data provided by the SBA and the 8(a) firm being considered for contract award.

If the requirement has a satisfactory procurement history, the agency would base its estimate of a current fair market price on recent award prices. However, the agency must make certain that these prices are adjusted to ensure comparability. The bill enumerates several factors to be considered in the adjustment: differences in quantities, preformance time, plans, specifications, transporation costs, packaging and packing costs, labor and materials costs, overhead costs, and any other appropriate costs. It is anticipated that careful attention to these guidelines will result in prices that are rationally related to the actual cost of performance.

In order to achieve the stated purposes of the 8(a) program, the Committee specifically rejects "lowest possible costs" as a standard for establishing a current fair market price. A predatory price, therefore, submitted by an ineligible contractor, that is unsubstantiated or unrelated to actual costs of production and supply, and not legally binding, is an inappropriate basis for establishing a fair market price for 8(a) contracts.

It is vitally important that SBA have access to the information being used to evaluate costs and to establish current FMP. Provisions are included in the bill, therefore, that permit SBA to receive such information upon request. To preserve the integrity of the procedure, however, fair market estimates established on the basis of such information can not be disclosed to any firm prior to or during contract negotiations.

Access to criteria on which the evluation is based would be meaningless without opportunity for appeal. For this reason, the firm selected to perform or negotiate for a contract under section 8(a) is given the right to request a detailed written statement documenting the method by which fair market prices have been established, and may file a protest with the SBA if the firm believes the method used does not comply with the requirements of this Act. The SBA may, in turn, appeal to the head of the buying activity if SBA agrees. Contract award would be suspended pending outcome of the appeal unless the agency issues a determination and finding that such suspension would jeopardize the public interest. The Committee expects, however, that a decision to deny suspension would not be made merely because it is convenient or advantageous to the government, but only when potential harm to the public interest is both imminent and substantial.

Of course, this right to appeal would only be applicable in cases where SBA selects the firm "to perform or negotiate" the contract. A selection "to perform" would pertain to a sole-source situation. A selection "to negotiate" would include 8(a) contracts that will be competed among 8(a) firms primarily on a basis other than price. In 8(a) competitions based upon price and other price related fac-

tors this appeal right should apply only after bid opening and only when the low bidder's price has been rejected as not being a fair market price.

SEC. 13. PROGRAM ADMISSION

The current 8(a) certification process needs to be streamlined and rationalized.

The bill would require SBA to designate a 60-day period each year during which it will accept 8(a) certification applications. After that period has expired, SBA must process all applications within 90 days. SBA is required to advise all applicants in writing when it has received the company's completed application and it must furnish any applicant a list of necessary missing application materials in a timely fashion upon receiving a written request for that information. Applications, further, are to be processed in a manner that allows SBA to determine the industrial and geographic distribution of applicants, their relative potential to succeed in the program, and the availability of resources and contract opportunities to service the needs of the new entrants. SBA is also required to make efforts to solicit applications from eligible firms located in areas of high unemployment or underemployment. Furthermore, a firm is eligible to participate in the 8(a) program only once, and if there is a transfer of ownership and control of a firm participating in the program, that firm's program participation term does not increase.

The Committee suggests, that SBA create a common 8(a) application package that is straightforward and that can be distributed upon request. The package should include a description of the 8(a) program, its goals, the expectations of the participants, as well as all necessary application forms.

Applications should be returned to appropriate SBA district offices during the designated 60-day period and applicants should be able to have any of their questions regarding their application answered by individuals within the district office. In addition, a prescreening of the applications should be undertaken at the district level to insure that the applications are complete. In addition, certain eligibility questions can be initially addressed. Notification of missing materials should be made to the applicant and SBA should consider designating one person in each district office whose primary responsibilities for the 60-day period would be to monitor the certification process and assist 8(a) applicants. The above actions would speed up the entire certification process, limit the time Business Opportunity Specialists must spend certifying firms for the program, and insure that applicants have adequate information and time to complete their applications.

From the district level, all applications should be sent to the central office as of a date certain after the expiration of the 60-day period for complete review. At this point, certain initial eligibility decisions will already have been recommended by the district office as well as confirmation that applicants have been notified of missing application materials.

The central office should review all applications carefully and be responsible for making recommendations to the Associate Adminis-

trator for Minority Small Business and Capital Ownership Development for selecting the portfolio of firms to be allowed into the 8(a) program in the upcoming year. The SBA must manage the number and geographic and industrial mix of firms selected for the program in such a way as to insure that the participants will realize the available benefits provided by the program, and to insure that the business development purposes of the program can be adequately fulfilled. At present, it appears that both the geographic and industrial mix of firms are highly skewed (see Exhibit 5).

To the extent practicable, the Central Office should recommend specific, objective criteria for accepting or denying admission into the program. Factors that should be considered are geographic location, the type of business, the relative potential for success of the applicant, and the availability of resources and contract opportunities required to assist the applicant.

EXHIBIT 5

Industrial and geographic mix of 8(a) portfolio (as of March 1987)

I. Industrial mix of 8(a) portfolio

Industry:	*Percent of portfolio*
Construction	33.7
Professional services	32.7
Nonprofessional services	17.4
Manufacturing	15.2
Concessions	1.1

II. Geographic mix of 8(a) portfolio

SBA geographic region:	*Percent of portfolio*
I	3.8
II	9.7
III	24.6
IV	11.5
V	10.3
VI	12.3
VII	3.8
VIII	4.8
IX	13.9
X	5.4

Criteria for geographic and industrial distribution as well as the determination of available program resources are relatively easy to ascertain. Standards for judging relative potential for success are not, of course, as clear. Such criteria could include number of years in business, marketing success and strategy, generally accepted financial ratios, and various management measures.

The Associate Administrator should send the notifications of its decisions to all applicants on the same calendar day. A notification of denial of admission should include an explanation for the negative determination. SBA should be able to supply denied applicants with such information as geographic and industrial distribution of admitted firms, and the average measurements of potential for success for those firms, against which denied applicants can compare themselves.

The Committee believes that an admissions program, as described above, would be a significant improvement over the current certification process. The new procedures would be faster because the present three-step process would be cut to two. Having a set period of time to accept and review applicants would free more time for Business Opportunity Specialists to work with and assist the 8(a) firms in their portfolio. Since the central Admissions Committee would have a key role in monitoring and controlling program entrance, the certification process itself would become a useful tool in program management and business development. It would also insure greater uniformity in the certification process.

In addition to rationalizing the 8(a) admissions process, the Committee believes that SBA must clarify its standards of eligibility for program entry. In particular, SBA should reevaluate its working definition of "economic disadvantage."

Currently, an individual having a net worth of less than $750,000 is presumed economically disadvantaged for purposes of the 8(a) program. While the Committee finds this figure unconscionably high, and that it is critically important to limit participation in the 8(a) program to truly economically disadvantaged persons, it would, nonetheless, be inappropriate to place in a statute a standard and inflexible numerical test. Therefore, the Committee suggests that SBA greatly lower the present regulatory threshold, and also develop procedures for assessing economic disadvantage that take into account the geographic location of the individual's business, the type and capital needs of the business, and the form and derivation of the individual's personal assets. Such procedures should provide a realistic, fair, and reasonable measurement of economic disadvantage.

Further, the Committee strongly believes that individuals seeking certification for the 8(a) program should be required to invest in, or commit to invest in, the applicant concern, personal assets of substantial value (other than a primary personal residence), or funds obtained from the hypothecation of such assets as a condition for applying for such certification. Such investments may be contingent upon certification, but determinations made regarding economic disadvantage should presume that such investments were actually made as of the date of application.

SEC. 14. DUE PROCESS RIGHTS

The bill would maintain existing due process rights for 8(a) firms when they face actions that would revoke their certification for assistance under the 8(a) program. It would also extend these rights to a firm that is denied a waiver, available under Section 16 of the bill, to permit relinquishment of ownership and control under certain conditions.

This section grants 8(a) firms an opportunity for a formal hearing, following procedures established under chapter 5 of Title 5 of the United States Code (the Administrative Procedures Act) in the following proposed agency actions—

(1) Termination from the program;

(2) Graduation for reasons other than expiration of program time limits; and

(3) Denial of a request for a waiver of the requirement that the disadvantaged owners maintain ownership and control of the firm throughout performance of each 8(a) contract or option.

The waiver, described further in a discussion of Section 16 of this bill, is available in cases that manifest a hardship, to avoid substantial harm to a public interest, or, on a temporary basis only, to enable the firm to obtain equity financing.

The Committee was concerned lest the creation of an additional right of appeal should impose an undue burden on the Administrative Law Judges designated to adjudicate appeals under the Small Business Act. For this reason the bill limits the grounds on which appeals may be made. The adjudicator need not accept jurisdiction if the matter has already been decided, or is the subject of a decision of an appropriate court, is untimely filed, has not been filed in accordance with the relevant rules and regulations, or if the matter does not, on its face, allege facts that, if proven, would warrant a decision in favor of the appellant.

It is not the Committee's intention to permit lengthy, drawn out proceedings subject to undue manipulation or delays. A decision of the adjudicator must be rendered, in most instances, within 90 days. The Administration's proposed actions are to be sustained unless they are arbitrary, capricious, or contrary to law. The decision is defined as the final agency decision and would be binding upon SBA.

SEC. 15. CONTRACT REQUIREMENTS

Subsection (a) of this section would require the Associate Administrator for Minority Small Business and Capital Ownership Development to include in the yearly estimate of 8(a) support needs submitted to each agency, the estimated dollar value and number of competitive contracts needed for the successful operation of the program.

The Committee believes that SBA should fully utilize the authority of section 8(a)(12) and, insofar as practicable, do valid forecasting for its program needs. This, by necessity, requires the review and rigorous analysis of aggregate support levels so that SBA can make informed judgments about resource allocations and the types of requirements the heads of various agencies should be encouraged to place at the disposal of the 8(a) program.

Subsection (b) deals with the complex issue of contract support. Currently, SBA pays almost no attention to support levels. It is the Committee's intent that SBA establish for each of its 8(a) firms a meaningful annual 8(a) contract support level. That level is to be an estimated dollar maximum of 8(a) contracts that can be awarded in the year to which it pertains. If, however, the term of performance of a contract (option or modification) actually awarded should be longer than one year, it is expected that SBA will allocate or credit to each year an appropriate proportion of the contract value that represents the work to be performed in that year.

The Committee also intends that each yearly support level be accompanied by a dollar amount of estimated non-8(a) contracts. The

support level, plus this amount, should equal the expected total sales of the firm for every year it is in the program.

Both the firm and the SBA are to take such efforts as are necessary and appropriate so that the firm will reach a goal of 35 percent non-8(a) sales by the end of its fifth year of program participation. It is the intent of the Committee that SBA will give wide latitude to the marketing strategy of an 8(a) firm in its early years in the program; however, it should assist the firm more affirmatively in its middle years in order to help it reach its 35 percent goal, bearing in mind the goal of the program is to develop a non-8(a) business base.

This mid-term goal is not intended to be a punitive device, but, rather, a measure or guideline of where the firm ought to be by the end of the fifth year if it can reasonably expect to successfully complete the program, and go on to compete in the mainstream of the American economy. The fact is that too many firms now increase their reliance on 8(a) contracts the longer they are in the program. As a result, they "fall off the cliff" when 8(a) support is removed, and go bankrupt. This extremely short-sighted approach must be stopped.

By insisting that 8(a) firms aggressively seek business outside the 8(a) program, the competitive posture of the firm should be improved when it leaves the program. The numerical figures are expressed as goals because no one can assure that "outside events" such as a severe recession or sudden economic shock such as the oil crisis of the 1970's or the recent stock market downturn would not make it impossible for some companies to reach their targets. Moreover, pending contract negotiations could cause individual firms to miss their goal because of unforeseen delays.

The Committee, on the other hand, realizes that a goal, without a sanction for non-compliance, may become meaningless. Consequently, if a participating firm engages in a course of action that evidences bad faith, as demonstrated by a blatant disregard of the goal, or the failure to engage in reasonable activities designed to reach the goal, SBA should consider the initiation of termination proceedings pursuant to section 7(j)(10)(F).

When exercising this authority, it is not intended that any action be based on a unique occurrence or on a precipitous event. The Committee, rather, would urge that SBA review patterns and practices of activities to ascertain trends and intentions.

In addition to the 35 percent mid-term goal, the subsection would require the establishment of a similar goal of 75 percent non-8(a) sales by the firm's ninth year in the program. The essential purpose of the 75 percent goal is to indicate both to SBA and the participating 8(a) firm how support levels should be adjusted during the sixth, seventh, eighth and ninth years in the program in order to protect against over reliance on 8(a) contracts as the firm is moving closer to graduation. Unlike the beginning years, it is the intent of the Committee that SBA assume a more aggressive posture during these last four years to manage the 8(a)/non-8(a) mix. If the firm has achieved its 35 percent mid-term goal, 8(a) sales—as a percent of total sales—should be decreasing by a yearly average of roughly 10 percent during the last four years in order to accomplish the 75 percent last year goal. This does not mean that each

year must have an exact decline of 10 percent, but, rather that the decline over the four (4) year period should average 10 percent per year. If, on the other hand, the firm exceeded the mid-term goal, the decline would be less steep; if it failed to achieve the goal, the decline during the last four years would be more rapid.

The Committee fully understands that a transition period must be made available for firms in the program as of the effective date of the bill. Accordingly, the bill provides that SBA is to establish alternate goals, in its discretion, for firms that will have been in the program for a period of longer than three years on the effective date of this provision.

The subsection would further provide that no 8(a) contract could be awarded to other than a small business concern. In addition, no 8(a) contract should be awarded, if to do so, would cause the firm to exceed its approved 8(a) support level. The support level cannot exceed, for any three year period, the size standard for the concern's primary industry.

The Committee intends that support levels be prospective and reviewed yearly to ascertain whether underlying assumptions remain appropriate. Appropriate adjustments should be made, but wholesale adjustments merely to reflect the 8(a) marketing success of a firm should be rejected.

The subsection also sets an upper limit on 8(a) contract support levels based on the size standard for the firm's primary industry. However, the Committee believes that this maximum level of support should seldom, if ever, be allowed. For the support levels to be equal to the size standard would require SBA approval that the firm could refrain from planning for any outside sales. The bill, however requires SBA to manage the 8(a)/non-8(a) mix and there can be no such management if SBA allows a firm to avoid non-8(a) marketing efforts.

In effect, the maximum support levels are intended to serve as a restraint against awarding "graduation gifts" that would bring the firm above the size standard. The maximum limits are not intended to indicate a level of 8(a) contract dollars that should flow to each firm. That determination should be based on the total sales a firm may need to become competitive in its market coupled with its mid-term and end-term non-8(a) goals. Further, in making these support level determinations SBA should consider not only the primary industry of the participating concern, but also its related industries, (see section 20). However, work in related areas should be viewed as supportive of a firm's primary industry and not as a substitute for it. In other words, the support level should be based on what a firm needs in sales to become competitive in its market; those sales, in turn, are chiefly comprised of work in the firm's primary industry and, perhaps, to a lesser extent, of work in relaed industries. If work in the so-called related industries is enjoying not only a dominance of the sales dollar, but also a dominance in the concern of the firm's management, it is time to change the primary industry designation as well as the 8(a) support levels. The resources of the program are so limited that it would be unfair for the program to attempt to make every 8(a) firm competitive in every industry in which it may have an interest, rather than focusing assistance on one primary industry per program participant.

The bill would also impose some limitations on SBA's exercise of discretion with respect to matching 8(a) requirements with 8(a) firms. Subsection (c) would provide that the 8(a) firm who first identified a requirement or would cause the requirement to be offered to SBA is to be authorized to negotiate for the award if three conditions are met: (1) it is a reasonable contractor; (2) the award would be in accord with the targets, objectives, and goals of the business plan; and (3) the requirement is not of an anticipated size that would warrant competition. Of course, if the requirement did exceed that size, but two or more responsible 8(a) firms could not be found that would offer fair market prices, the requirement could still be sole sourced to firms in the order of priority established under this subsection.

In addition, the bill would require SBA to establish a system for the equitable distribution of contracts when no 8(a) firm has been nominated for the award and when no firm has been identified as causing the requirement to be offered to SBA.

Present SBA regulations on this subject (13 C.F.R. sec. 124.301(b)(6)) are totally inadequate and warrant revision. Regulations on this subject should, to the extent practicable, be objective and correlate more closely with the purposes of the program. For example, the present regulations could be interpreted as affording priority to firms that are more technically qualified. This, however, may be used to the disadvantage of smaller firms that cannot compete on an equal basis with the larger 8(a) firms. In any event, the present regulations are so vague that they invite abuse.

SBA should, therefore, establish an objective system of priorities for "open" requirements that is easily understood and not readily subject to abuse. It is strongly recommended that SBA give great deference to business plans, goals, and objectives (including support levels) and relative achievement against those measures when deciding who is to be given first priority for these requirements.

The subcontracting limitations contained in subsection (d) would provide that a business cannot be considered a "small business concern" for purposes of a set-aside or 8(a) contract unless it agrees, for a service contract, to perform at least 50 percent of the cost of the contract for direct labor with its own employees, and, for a manufacturing contract, to perform at least 50 percent of the cost of manufacturing the supplies—not including the cost of materials. SBA is to promulgate percentages for the construction industry and other industries not specifically covered by the text of the amendment. SBA is given the discretion, on an industry-by-industry basis, to change the 50 percent limitation to reflect conventional industry practices.

Finally, subsection (e) would require SBA, to the maximum extent practicable, to eliminate delay, excessive regulation, and excessive paperwork. With respect to processing options and contract modifications, SBA is to make substantial and sustained efforts to achieve a maximum 10 day processing time.

SEC. 16. FRAUD, WASTE AND ABUSE

Subsection (a) would define the relationship that a SBA employee or past employee could have with an 8(a) firm. A SBA employee

cannot, during his/her term of employment and for a period of two years thereafter, take or participate in any of the following actions with respect to an 8(a) firm that was in the program during the employee's term of employment—

(1) The buying, selling or receipt of any legal or beneficial ownership of stock or other ownership interest or the right to acquire any such interest;

(2) The making or carrying out of any agreement to obtain any such right or interest; and

(3) The receipt of any other benefit or right that may reasonably be considered an incident of ownership.

An employee or former employee who violates these prohibitions would be subject to a civil penalty, to be assessed by the Attorney General, that cannot exceed 300 percent of the gain that was realized or could have been realized by engaging in the proscribed activities.

This subsection would also specifically prohibit any SBA employee who has the authority to take, direct, recommend, or approve any action taken under 7(j) or 8(a) from exercising or threatening to exercise that authority on the basis of the political activity or political affiliation of any party. Employees would be required to report to the Inspector General whenever their participation in such an action has been directed or solicited. An employee who violates any of these prohibitions would be subject to disciplinary action. If the Administrator or Deputy Administrator violates the provisions, mandatory separation from service would be required.

These provisions are not, of course, intended to cover normal status inquiries or inquiries relative to whether a particular law or regulation may have been violated. However, the provisions are intended to embrace all situations in which an SBA employee is told or solicited to do something or refrain from doing something because of the political activity or affiliation of any party. The source of the direction or solicitation is of no consequence—it must be reported to the Inspector General.

In order to ascertain the level of activity of consultants and lobbyists to 8(a) firms, the subsection would require 8(a) firms to submit quarterly reports on consultants (and all other types of representatives) that received compensation from a concern to secure any type of Federal contract. The listing must show the amount of compensation paid to each and must also contain a description of what each consultant did in return for the compensation paid. The Associate Administrator's office is to review every report and is required to report to the Inspector General any suspicion of improper activity ascertained from a review of the reports. The Associate Administrator is also directed to report to the House and Senate Committees on Small Business on any small business that has failed to submit its quarterly report.

Subsection (c) relates to the performance of 8(a) contracts. As a general rule, an 8(a) contract (or option) is to be performed by the 8(a) concern that was initially awarded the contract. If the owners upon whom eligibility was based relinquish ownership or control during the term of performance, the contract is to be terminated for the convenience of the government, unless a prior waiver has been granted by the Administrator. A termination for convenience

would, or course, preclude the Government from recovering any repurchase costs or other measure of damages and would entitle the firm to, among other things, a reasonable profit.

A waiver can be granted by the Administrator under only one or both of the following circumstances:

(1) Exceptional circumstances that evidence a manifest hardship on the disadvantaged owners and the failure to give a waiver would substantially harm the public interest. This situation would exist, for example, if the owner had to withdraw his or her capital from the business for health reasons and, without the sale of the firm, it is probable that the company would be liquidated. The public interest to be protected here would be the existence of a small business and the jobs of its employees.

(2) When necessary for the owners to surrender partial control on a temporary basis in order to obtain equity financing. The term "control" here is not intended to embrace stock ownership issues. Instead, the control referred to is the day to day management of the business. Under this exception, a waiver could be granted if, for example, it is necessary for the firm to agree to negative covenants as a temporary condition for obtaining equity capital. For example, if a potential investor required a present or former 8(a) firm to agree not to incur additional debt for a certain period as a precondition for its investment, a waiver could be appropriately granted. However, it must be noted that the waiver applies only to the termination of the contract and not to the others consequences that might stem from an agreement deemed to create an affiliation between the investor and the firm.

The failure to grant a waiver under either of the exceptions explained above is reviewable, pursuant to section 14, by an Administrative Law Judge.

Subsection (d) of this section would increase criminal penalties from $50,000 to $500,000 and from five years imprisonment to ten years imprisonment for a violation of section 16(d) of the Small Business Act. That section of the Act makes it a crime to make any written misrepresentation regarding the status of a concern as a "small business" or a small business "owned and controlled by socially and economically disadvantaged individuals" in order to obtain any contract or subcontract pursuant to sections 8, 9, or 15 of the Act. In addition, the coverage of the existing section 16(d) includes any other "prime or subcontract to be awarded as a result, or in furtherance, of any other provision of Federal law that specifically references section 8(d) for a definition of program eligibilty."

Subsection (e) would reaffirm and clarify existing law by specifically naming the Inspector General as a party subject to requirements of section 10(e) of the Small Business Act. That section provides a ready means for the Committee to obtain information necessary for the conduct of its investigations.

The subsection would also add a new paragraph (2) to section 10(e) of the Act. The new paragraph provides that either Committee on Small Business of the House or Senate may request the Inspector General (I.G.) to conduct an investigation of any program or activity conducted under section 7(j) or 8(a) of the Act. The I.G. would then have 15 days from the receipt of the request to either deny it or to inform the requesting Committee of an estimated time

for completing the investiation. The investigation request may be denied only for good cause, and the I.G. must provide the Committee with "a written and detailed explanation of the reasons for the denial within such fifteen-day period." If the I.G. does undertake to conduct the investigation, the requesting Committee must be kept informed of the progress of the investigation and provided, in a timely manner, "a detailed written report of its findings, conclusions, and recommendations."

Subsection (f) of the section would require that the Associate Administrator for Minority Small Business and Capital Ownership Development be a career employee. The Committee, therefore, would expect that no political appointees would be employed within or detailed to the Office of Minority Small Business and Capital Ownership Development or its counterparts within the Regional or District Offices.

SEC. 17. "NON-MANUFACTURER" RULE

The section would allow government contracts to be set aside for small business or reserved for the 8(a) program when there are no small domestic producers of the end product being sold to the government. This section provides a waiver of the "non-manufacturer" rule in the limited situation where a potential contractor for an 8(a) or set-aside contract meets the regular dealer qualifications of the Walsh-Healey Public Contracts Act, but cannot meet the further regulatory requirement that products of a small business be supplied—because none are to be found in the federal market.

The bill provides that for both small business set-asides and 8(a) contracts, the offer of a small business may not be excluded solely for the reason that such business concern is not the manufacturer or processor of the product being sold under the contract if the concern is: (1) engaged primarily in wholesale or retail trade; (2) a regular dealer in the product, as defined by the Walsh-Healey Act, or is exempt from the regular dealer requirement under provisions of section 7(j) as amended in section 7 of this bill; and (3) will supply an end product that is manufactured or processed by a domestic firm.

SEC. 18. SUBCONTRACTING PLANS

Section 8(d) of the Small Business Act presently requires most Federal contracts above certain dollar thresholds that are awarded to other than small businesses to contain subcontracting plans containing goals for the utilization of both small and small disadvantaged business. Section 18 would amend section 8(d) of the Small Business Act to require these government contracts that include subcontracting plans to contain clauses that provide for liquidated damages if the contractor fails to comply in good faith with the plan's requirements. This section also contains a provision that goals cannot be set unreasonably below the prime contractor's actual past performance.

The subcontracting plan is a material part of the contract to which it pertains, and goals for subcontractor participation are most often negotiated items. The goals are intended to insure that the contractor subcontracts to the maximum extent practicable to

small and small disadvantaged business concerns. Liquidated damages is a term that describes a sum of money expressed in the contract as an amount to be recovered for breach of the agreement. It is an appropriate method of determining monitary compensation in situations where actual damages are uncertian in nature or difficult to ascertian.

Maximum practicable utilization of small and small disadvantaged business concerns as subcontractors in government contracts is a matter of national interest with both social and economic implications. Use of these firms as subcontractors is a deliverable item under the contract and has considerable value. When a contractor fails to perform according to the terms of the agreement, the government does not receive the full benefit of its bargain and has a right to be compensated. Liquidated damages form a part of the agreement of the parties at time of contract award and represent a reasonable forecast of damages that would actually be suffered by the government in the event of a breach. It is anticipated that use of liquidated damages clauses will encourage contractors to comply with the terms of the subcontracting agreement and to aggressively seek out and develop additional sources competent to perform government work.

The sanction provided by the liquidated damages clause is, of course, in addition to those already in the contracting officer's arsenal. Because the subcontracting plan is a material term of the contract, the contracting officer has authority to terminate the contract in the event of a breach of provisions relating to the subcontracting plan. The contracting officer may also include incentive clauses in the contract providing additional compensation for exceptional performance by the contractor in reaching and exceeding the goals. The availability of liquidated damages will further assure contractor compliance with the subcontracting program, promote the competitive viability of small business firms, and increase the number of suppliers for government needs and requirements.

The Committee recognizes that good faith efforts will be needed to establish percentage goals that reasonably reflect maximum practicable participation. Goals will vary according to the number of qualified small and small disadvantaged business concerns within a specific industry category available to perform in a given geographic area and within the required period of time. Agency personnel, in consultation with SBA, are responsible for monitoring the appropriateness of goals proposed by the prime contractor. Care must be taken that agency review not deteriorate into a routine rubber stamp of goals that are artificially low and that bear no relation to reality. One measurement will be the level of participation achieved in past performance. The Committee fully expects a concerted effort to steadily increase both goals and achievement levels to provide capable small business performers the chance to enter and successfully compete in the Federal market place.

It is the opinion of the Committee that inclusion of liquidated damages clauses as a means of enforcing compliance with subcontracting provisions will create a cause of action against a contractor under section 3730, chapter 37 of Title 31 United States Code. Section 3730 enables private individuals to bring civil actions for

themselves and for the government for violation of the False Claims Act, section 3729, chapter 37 of Title 31 United States Code.

The False Claims Act makes liable any person who presents to the government a request or demand for payment, or conspires to defraud the government by getting a fraudulent claim allowed or paid, including payments under a government contract, if that person acts in deliberate ignorance or disregard for the truth in order to have the claim paid. A false claim has been interpreted to include request for payment under a contract in which misrepresentation of a material fact was made and without which the contract would not have been awarded. The subcontracting plan is, by statutory definition, a material term of the contract. Deliberate failure to comply with its terms, if the contractor knows or has reason to know that eligible subcontractors are ready, willing and able to perform, would constitute a breach of a material term of the contract, and in our opinion, a request for payment under the contract would be a material misrepresentation to qualify for payment, would constitute a false claim within the meaning of the False Claims Act, and thus would rise to a suit under section 3730.

Section 3730 suits alleging violations of the False Claims Act, called Qui Tam, or Informers' Actions, may be initiated by persons at their own expense, and successful prosecution may result in an award to the informer of a percentage of the proceeds recovered under the action in addition to reasonable expenses incurred in bringing the action.

SEC. 19. RELATIONSHIP WITH OTHER PROCUREMENT PROGRAMS

The section would require that the Department of Defense (DOD), when implementing section 1207 of Public Law 99-661, establish policies and procedures to insure that there will be no reduction in the current number or dollar value of either 8(a) contracts or small business set-asides.

It is the intent of the Committee that DOD not take contracts from the 8(a) or small business set-aside programs for award under the special programs established pursuant to section 1207. Small business is receiving only about 19 percent of the DOD prime contract dollar even though small firms account for over 99 percent of all firms in the country. The five percent goal should be achieved, primarily, by taking from the over 80 percent share of the budget going to the 1 percent of firms considered to be big businesses. DOD excuses that small disadvantaged firms that cannot perform any part of the 80 percent share are rejected since the Department has not (1) fully utilized its breakout authority; (2) established a meaningful policy to prevent contract consolidations which unjustly harm small firms; (3) adequately explored the use of innovative techniques such as mandatory teaming agreement and "leader-follower" arrangements for major systems acquisitions, and (4) fully utilized its authority pursuant to the subcontracting provisions of section 211 of Public Law 95-507.

The section of the bill also requires that all of SBA's procurement center representatives (PCRs) monitor and report on the performance of agencies with respect to all three of these procurement programs. PCRs are also specifically directed to increase, insofar as

possible, the number and dollar value of procurements that may be used for small business set-asides, section 8(a) awards, and section 1207 set-asides.

The bill provides authorization for the hire of traditional PCRs (see section 25). It is the intent of the Committee that SBA make appropriate efforts to assign the new PCR's, on a priority basis, to states that do not yet have any permanent PCR, but which do contain major buying activities.

The section would, in addition, allow a small disadvantaged firm to exceed the relevant size standard by not more than 25 percent and still be considered "small". However, this differential is intended to apply only to procurement programs established solely due to the authority granted under section 1207. The only program thus far established under section 1207 is the small disadvantaged business set-aside program. If, however, DOD elects to create a single source negotiation program under section 1207 or any other less than full and open competitive method, the 25 percent differential should be applied. In no instances, however, may the increased size standard be used with reference to 8(a) contracts or any procurement method established under the Small Business Act.

SEC. 20. STANDARD INDUSTRIAL CLASSIFICATION CODE LIMITATIONS

This section would provide that SBA limitations based on standard industrial codes (SIC) shall not be applied in a manner that prohibits the logical business progression of an 8(a) firm into areas where it has the potential for success.

The significant issue in approving related SIC's is whether the firm can succeed in that new area and whether that area is related in some logical way to its primary business activity. Rigid limitations based upon division classifications ought to be rejected.

The business plan should, of course, contain a clear description of the markets and the marketing strategy the firm intends to follow. Requests for related SIC's should be made to correlate with this strategy and become a part of it.

SEC. 21. DIRECTORS OF SMALL AND DISADVANTAGED UTILIZATION

The status of the Director of the Office of Small and Disadvantaged Business Utilization (OSDBU) in each Federal agency is established by subsection 15(k) of the Small Business Act which requires that the Director be responsible to, and report directly to, the head of the agency or his or her deputy. An exception to this provision, however, was created for the OSDBU Director at the Office of the Secretary of Defense (OSD) by Public Law 99–661, the Defense Authorization Act of 1987. The OSDBU Director at OSD was directed, instead, to report to the newly created Under Secretary of Defense for Acquisition. Section 21 of the bill would amend subsection 15(k) of the Small Business Act and restore this office to its original status in order to promote the Director's effectiveness as an advocate for small and disadvantaged businesses. Maintenance of this high level position is necessary to provide immediate access to a level above those who set and formulate policies affecting procurement.

This section further amends subsection (k) by adding a new paragraph that creates additional responsibilities for OSDBU Directors relative to the awarding government contracts. This amendment became necessary with the enactment of Public Law 99-661 which has been used to establish a special small disadvantaged business set-aside program within the Department of Defense. Public Law 99-661, the Defense Authorization Act of 1987 created a Department of Defense procurement goal of 5 percent for small disadvantaged business (SDB) and authorized a SDB set-aside program as a mechanism for achieving the 5 percent goal (see section 19 for a discussion of section 1207 set-asides). This section of the bill will assist agency personnel in making decisions about appropriate contracting methods and the selection of requirements.

More specifically, OSDBU Directors would be required to make recommendations to contracting officers concerning procurement methods used in solicitations for particular agency requirements, whether such requirements are suitable for the 8(a) program, section 15 small business set-asides, or DOD section 1207 SDB set-asides. Guidelines upon which the director's recommendations should be based are contained in section 19 of this bill.

SEC. 22. REGULATIONS

To insure that appropriate public comment can be made on the regulations implementing the provisions of the bill a timetable for their promulgation would be mandated. The bill requires SBA to convene public meetings of present and potential 8(a) participants in order to ascertain comment on any regulations that may be needed, within 60 days after the date of enactment; to publish proposed rules and regulations within 120 days after the date of enactment; and to publish final rules and regulations within 120 days after the date of enactment. The Committee believes that allowing for comment on the regulations is crucial given their importance in determining how the 8(a) program will operate and the potential impact they will have on present and future 8(a) contractors.

The Committee expects SBA to convene public meetings throughout the country in order to obtain input on the nature of the 8(a) regulations. SBA must make efficient use of its time and resources in providing to a broad base of present and possible 8(a) participants the opportunity to comment on the regulations. The Committee expects SBA to hold at least one meeting in each SBA region as well as in each SBA district with a substantial minority population. To the extent practicable, notice of the meetings should be provided to current 8(a) contractors as well as to minority organizations and associations within the region or district where the meetings, are to be held.

It is incumbent upon SBA to solicit comments on the 8(a) regulations from both present and potential 8(a) contractors. Firms that are currently in the program are relatively well organized and are likely to participate in the public dialogue on those regulations. However, the bill would reform the program for the benefit of a much greater number of 8(a) concerns in the future as well. These firms are likely to be underrepresented during the public comment period. SBA must make a special effort to consider the perspective

of future 8(a) concerns, and avoid being influenced by undue pressure from established 8(a) firms. All of this, of course, is not to suggest that the valuable experience and the concerns of older 8(a) firms be ignored, but to insure that there is a balance of possibly competing needs of older, younger, and future 8(a) companies.

This bill provides SBA with a unique opportunity to improve the 8(a) program. The Committee urges SBA to take full advantage of this opportunity. Much of the success of the program reforms will depend on their implementation by SBA, and the Committee will be monitoring this process carefully.

SEC. 23. EMPLOYEE TRAINING AND EDUCATION

Subsection (a) of the section would require SBA to provide Business Opportunity Specialists (BOS) with training on how to successfully operate the Capital Ownership Development Program and achieve its purposes.

Subsection (b) would have the effect of merging the positions of contract specialist or negotiator with that of the BOS. The Committee expects that SBA will provide the BOS with the training needed in order to secure the appropriate contract warrant. Any individual who cannot successfully qualify for an appropriate warrant should be re-assigned to other duties for which he or she does qualify. The Committee strongly suggests that SBA strive for and achieve a maximum ratio in each district of 1 BOS for each 15 section 8(a) firms.

The Committee also urges that SBA seriously consider a team approach to program delivery. In this regard, each BOS should have a loan officer and a Business Development Specialist assigned to the BOS' portfolio. The loan officer could help the BOS evaluate the financial strengths and weaknesses of the firm and, in conjunction with the firm, assist in the development of a plan of action that can be included in the business plan to address noted deficiencies.

In a similar way, Business Development Specialists could assist in identifying areas where the firm could improve its planning, organizing, staffing, directing, and controlling of each of its major business functions. A plan of action should also be developed on this topic and included in the business plan.

The BOS should help the firm to develop its marketing plan and should act as a coordinator and reviewer of the financing and management plans of action to be included in the overall business plan (see section 4 for a more complete discussion of what should be included in the business plan).

Subsection (c) of the section would require, to the extent practicable, that the performance of a BOS be measured, in substantial part, by how well the BOS' assigned portfolio is achieving competitiveness and furthering the business development purposes of the program.

The Committee does not intend that BOS's be held to impossible standards of performance or that they be measured by criteria over which they have no control. However, the agency—working with BOS's—should develop standards of performance that recognize those things that a BOS can do to promote competitiveness and

that rewards the BOS when those efforts prove successful. Consequently, SBA must first develop a measure of the competitiveness of its portfolio of firms; identify specific activities that the BOS needs to do to promote positive movement against those measures; and then assess if performance of the firms during the evaluation period were positively influenced by the BOS.

SEC. 24. MISCELLANEOUS AND TECHNICAL PROVISIONS

Subsection (a) would require that the GAO submit annual reports to the Congress on the conduct of both the 7(j) and 8(a) program activities. Of particular concern to the Committee would be the efforts SBA has undertaken to promote business development and measure success of the program effort.

Subsection (b) is a technical amendment needed to confirm existing law with the provisions of the bill.

Subsection (c) would exempt 8(a) firms owned and controlled by economically disadvantaged Indian tribes from the competitive threshold requirements of section 11. In other words, such tribally owned businesses would be eligible to receive sole source contracts under section (a) of any dollar size irrespective of whether there are two more responsible 8(a) firms capable of competing at fair market prices.

Subsection (d) would require SBA to continue its 8(a) price competition on the Navy's repetitive requirement, among the two incumbent competitors if there is a reasonable expectation that such competitors will continue to submit offers at fair market prices.

Subsection (e) would require the government to make substantial and sustained efforts to negotiate a price an all unpriced options contained in 8(a) contracts with the contractor that initially received the award. The effort is to take place and be concluded within 60 days after the date of enactment of the bill. During that 60 day period agencies are to refrain from awarding the requirements to alternative sources unless it is necessary to avoid a substantial harm to the public interest.

The Committee intends that SBA will aggressively pursue this direction and will advise small businesses and federal agencies of the requirements of this subsection.

SEC. 25. AUTHORIZATION

For fiscal year 1988, the bill would provide for specific authorizations of $4,735,000. Of that amount $735,000 will be used for the hire of approximately 15 traditional procurement center representatives. An additional $2,765,000 will be used for the cost associated with the hire of approximately 71 additional Business Opportunity Specialists.

Of the remaining $1,235,000, $1,100,000 is to be used to train present BOS's and the 71 additional BOS hires in contract negotiations. The remaining $135,000 should be used for employee relocation expenses and the conduct of meetings among present and potential 8(a) applicants to discuss the regulations needed to implement the new bill.

SEC. 26. EFFECTIVE DATES

Except as otherwise provided, the Act would become effective one year after the date of enactment. However, the following sections would be effective upon the date of enactment.

(1) Section 5. Effect on Present Program Participants.

(2) Section 12. Fair Market Price.

(3) Section 19. Relationshp With Other Procurement Programs.

(4) Section 20. Standard Industrial Classification Code Limitations.

(5) Section 21. Directors of Small and Small Disadvantaged Business Utilization.

(6) Section 22. Regulations.

(7) Section 23. Employee Training and Evaluations.

SEC. 27. REVIEW OF COMPETITIVE THRESHOLDS

The bill would require GAO to report annually on whether competitive thresholds have furthered the business development purposes of the bill and on other competitive procurement techniques that may be necessary to advance such purposes. The thresholds would cease to be effective after three years if the Comptroller General determines that they have impeded the business development purposes of the Act and a Joint Resolution of Congress is enacted that agrees with the findings of the Comptroller General and provides for a new or modified system to insure appropriate competition in the award of 8(a) contracts.

CONCLUSION

This bill is the result of extensive study and analysis by the Committee. It is our conclusion that the Capital Ownership Development Program is vital to small disadvantaged business and must be preserved. However, the program has been misunderstood, misued and mismanaged and is in need of major reform.

The bill would address these problems by re-directing the program toward business development purposes. More small disadvantaged business should be able to participate in this effort and the entire economy will benefit from the increased utilization of such firms.

The bill would reform the program by establishing a structured three-tiered program where business development assistance can be properly allocated according to the varying needs of program participants. Competition would be provided for, both within and external to the program, so that firms are adequately prepared to participate in the mainstream economy. SBA procedures are streamlined and its personnel required to undergo mandatory training that will both enhance the program effort and help realize the full career potential of these federal employees. Finally, specific and unequivocal measures would be adopted to militate against fraud, waste, and abuse that have robbed legitimate 8(a) firms of their fair share of program resources.

The Committee believes that the bill presents an equitable, reasonable, and cost-effective means of promoting the legitimate business development needs of small business concerns owned by the

socially and economically disadvantaged. If enacted, and forcefully implemented, this measure will contribute significantly both to the minority business community and to the entire national economy.

Matters Required To Be Discussed Under House Rules

In compliance with clause 2(l)(2) of rule XI of the House of Representatives, the following statement is made relative to the vote on the motion to report H.R. 1807.

A majority of the Committee voted in person and was actually present and the motion was approved by a recorded vote of 40 ayes and 1 nay.

In compliance with clause 2(l)(3) of the rule XI of the Rules of the House of Representatives, the following statements are made:

With regard to subdivision (A), relating to oversight findings, the Committee finds, in keeping with clause 2(b)(1) of rule X, that this legislation is in full compliance with the provision of this rule of the House which states:

> In addition each such committee shall review and study any conditions or circumstances which may indicate the necessity or desirability of enacting new or additional legislation within the jurisdiction of that committee. * * *

With regard to subdivision (B), relating to the statement required by section 308(a) of the Congressional Budget and Impoundment Control Act of 1974, the following statement is made relative to the legislation:

Section 3(3) of the Congressional Budget Act defines the term "tax expenditures" as those revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability.

None of the provisions of H.R. 1807 deals with taxation and thus, in your Committee's opinion, this bill does not provide new or increased tax expenditures.

Section 3(2) of the Congressional Budget Act defines the term "budget authority" as authority provided by law to enter into obligations which will result in immediate or future outlays involving Government funds or to collect off-setting receipts.

Section 3(10) of such Act defines "credit authority" as authority to incur direct loan obligations or to incur primary loan guarantee commitments.

Under these definitions, it is the final action of Congress that authorizes an agency to enter into obligations which constitutes new budget authority or new credit authority. In those cases which entail (1) an authorization for an agency to undertake a program or enter guarantees; (2) an authorization for appropriation of funds to permit that agency to enter into obligations; and (3) an actual appropriation of such funds, it would be only the final action of Congress in appropriating funds which constitutes the budget authority or the credit authority.

None of the provisions of H.R. 1807 appropriates funds and thus, in your Committee's opinion, the bill does not provide new budget authority or new credit authority.

With regard to subdivisions (C) and (D), the estimate and comparison of the Director of the Congressional Budget Office relative to H.R. 1807 follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 20, 1987.

Hon. JOHN J. LAFALCE,
Chairman, Committee on Small Business,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 1807, the Capital Ownership Development Reform Act of 1987, as ordered reported by the House Committee on Small Business, November 9, 1987. We estimate that enactment of this bill would result in additional costs to the federal government of $25 million to $45 million over the 1988–1992 period, assuming appropriation of the necessary amounts. These costs do not reflect the budget impact of the proposed revolving fund, which would be determined through the appropriation process. Because the bill includes a provision that would require competition for certain contracts, some savings to the federal government could occur. The magnitude of any savings is uncertain, but with non-competitive Section 8(a) contracts totaling about $3 billion annually, potential savings could be substantial.

H.R. 1807 would make a number of changes to the Small Business Administration's (SBA) Section 8(a) and 7(j) programs. The bill would establish a nine-year fixed term from participation in the programs, and would require firms to compete for certain contracts. In addition, the bill would require SBA to establish three stages of program participation: developmental, transitional, and mainstreaming. Different types of federal assistance would be available at each stage of development. Also, the bill would increase data collection and reporting requirements by SBA, and would authorize appropriations for the hire of additional procurement center representatives and business opportunity specialists. Lastly, the bill would require the General Accounting Office (GAO) to conduct an annual review of the competitive thresholds established in the bill.

Based on information from SBA, we expect that the number of concerns certified as eligible for the Section 8(a) program would increase if the maximum participation term is increased from seven to nine years. Under the present seven-year program, the Section 8(a) portfolio consists of nearly 3000 business concerns. We estimate that enactment of the bill would increase the size of the portfolio by about 800 firms by the end of fiscal year 1989, compared to current law. Based on this assumption, we expect that SBA would incur additional costs of about $1 million in fiscal year 1988 and about $3 million a year in fiscal year 1989 and beyond to maintain the level of services currently provided to Section 8(a) participants.

The bill would require firms to compete for contracts that are likely to exceed $2 million for construction, manufacturing, services or retail purposes, and $1 million for all other purposes. Over the past few years, non-competitive Section 8(a) contracts have to-

taled nearly $3 billion annually. Requiring competition on some of these contracts could result in lower prices to the federal government. The extent of any savings is unknown, but given the large dollar value of Section 8(a) contracts, potential savings could be substantial.

The bill would provide financial assistance to concerns in the developmental stage of the program for training of employees or potential employees. Based on information provided by SBA, we estimate that in fiscal year 1989 about 2000 concerns would be placed in the developmental stage. Presently, each firm participating in the program employs, on average, 24 workers. If this number continues to hold true, we estimate that nearly 50,000 workers would be eligible for training assistance in fiscal year 1989. The number of workers that would require training, and the cost associated with such training, is uncertain. If, for example, 25 percent of the eligible workers are trained at an average cost to the federal government of $1,250 (one-half the maximum specified in H.R. 1807), the total cost would be nearly $16 million. This cost likely would be incurred in fiscal years 1989 and 1990. As the backlog of firms in the developmental stage is reduced, training costs would decrease substantially. Using the above example, training costs would decrease to about $2 million in fiscal year 1991 and beyond. Training costs could be higher or lower than these levels depending on demand as well as the level of appropriations provided to SBA for this purpose. This estimate assumes that training would be provided to between 5 percent and 25 percent of eligible workers.

The bill would establish a revolving fund within the Treasury that would be made available to SBA, without fiscal year limitation, for the purpose of providing loans or loan guarantees to concerns in the transitional and mainstreaming stage of the program. In addition, the bill would authorize appropriations of such sums as may be necessary for the purposes of this provision. Unobligated funds previously appropriated for business development expense would be transferred into the revolving fund, and the current grant program, which is spending about $12 million annually for business development expenses, would be eliminated. We cannot estimate the potential budget impact of this provision because the mix of loans (direct vs. guaranteed) and the level of assistance are both uncertain. Assuming that the appropriation for the new loan program does not exceed the amount presently spent for business development expense, this provision would not result in additional cost to the federal government. It could, however, necessitate an increase in the ceiling for SBA direct and guarantee loans if reductions are not made in other loan programs to offset any increase in loans for business development.

Enactment of the bill would increase data collection and reporting requirements by SBA. According to SBA, about $2 million in additional funding would be needed in fiscal year 1988 for the acquisition of additional computers, software development, and other expenses relating to this provision. About $1 million annually in additional funding would be required in fiscal year 1989 and beyond for software maintenance and support, and other expenses.

For fiscal year 1988, the bill would authorize appropriations of $4,735,000 to implement certain sections of the bill, including the

hiring of procurement center representatives and business opportunity specialists. Assuming appropriation of the authorized amount, we would expect outlays to total $2 million in fiscal year 1988 and $2.7 million in fiscal year 1989.

H.R. 1807 also would require the General Accounting Office (GAO) to conduct an annual review of the competitive thresholds established in the bill. This review would be required annually for three years after enactment of the bill. We expect this review to cost less than $500,000 annually.

No costs would be incurred by state and local governments as a result of enactment of this bill.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

JAMES BLUM
(For Edward M. Gramlich, Acting Director).

No oversight findings or recommendations have been made by the Committee on Government Operations with respect to the subject matter contained in H.R. 1807.

In compliance with clause 2(l)(4), the Committee concludes that the provisions of this legislation in and of themselves will have no inflationary impact on prices and costs in the operation of the national economy.

In compliance with clause 7, rule XIII of the House of Representatives, the Committee makes the following statement:

The cost estimate and comparison prepared by the Director of the Congressional Budget Office has been included above. Accordingly, it is not necessary for your Committee to include an estimate of the costs of carrying out this bill in this fiscal year and the five subsequent fiscal years.

No cost estimate was submitted by any Government agency on H.R. 1807 to your Committee.

In your Committee's opinion, the above statements fully comply with the Rules of the House of Representatives.

SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE

This section contains the short title of the bill: "The Capital Ownership Development Reform Act of 1987".

SECTION 2. FINDINGS AND PURPOSES

This section contains a recitation of Congressional findings and purposes. The Congress would find that the Capital Ownership Development Program (hereinafter referred to as the "program") and the award of 8(a) contracts are intended to help socially and economically disadvantaged persons enter the economic mainstream; that while some progress has been made, the program has failed to meet its objectives; that the Small Business Administration (SBA) and some program participants have given insufficient attention to business development; and that it is necessary to reform substan-

tially the program and to provide for competition in order to promote business development. The purposes of the Act would be threefold: (1) to affirm that the program and section 8(a) authority are to be used exclusively for business development to help disadvantaged firms compete on an equal basis in the economy; (2) to affirm that the measure of success of the program shall be the number of competitive firms that exit the program without being unreasonably reliant on 8(a) contracts; and (3) to insure that program benefits accrue to socially and economically disadvantaged individuals.

SECTION 3. BUSINESS DEVELOPMENT OBJECTIVES

This section would amend subsections (c) and (e) of section 2 of the Small Business Act. The Amendments would state the purposes of both the 7(j) and 8(a) authorities contained in the Act. The purpose of 7(j) would be to foster business ownership and development by groups that own and control little productive capital and to promote the competitive viability of such businesses through the program by providing such financial, technical, and management assistance as may be necessary. The purposes of section 8(a) are to promote business ownership by disadvantaged persons so that they may compete on an equal basis in the economy; promote the competitive viability of such concerns through the provision of such assistance as may be necessary; and to clarify and expand the program for the procurement by the government of supplies and services from disadvantaged businesses.

SECTION 4. REQUIREMENTS OF THE CAPITAL OWNERSHIP DEVELOPMENT PROGRAM

Subsection (a) would amend section 7(j)(10)(A)(i) of the Small Business Act to provide that the program should assist firms establish business plans with realistic targets, objectives and goals designed to overcome a concern's economic disadvantaged.

Subsection (b) would further amend the Capital Ownership Development Program established by section 7(j)(10)(A) by adding a new clause (vii) that requires the Administration to provide business training for program participants to enhance their competitive ability in the marketplace.

SECTION 5. EFFECT ON PRESENT PROGRAM PARTICIPANTS

This section would amend section 7(j)(10) of the Small Business Act by adding a new subparagraph (D). This provision, which becomes effective on the date of enactment, would allow an existing 8(a) firm to remain in the program for the longer of (1) nine years minus the number of years since the award of its first 8(a) contract, or (2) its original fixed program participation term and any extension given to such term. Notwithstanding these maximum year limitations, firms may be graduated or terminated at any time.

SECTION 6. TERMINATION AND GRADUATION STANDARDS

This section would amend section 7(j)(10) of the Small Business Act by adding three new subparagraphs. Subparagraph (E) would codify present SBA regulations by specifying that there are four

ways to exit the program: (1) the firm voluntarily elects not to participate; (2) the firm has reached its maximum 9 year time limit; (3) the firm is terminated pursuant to a termination proceeding; or (4) the firm is graduated pursuant to a graduation proceeding.

Subparagraph (F) would define the term "termination" as the total denial or suspension of assistance and would specify that a termination action must be based upon "good cause" including: (1) the failure to maintain a standard of eligibility; (2) a violation of a legal requirement regarding prohibited actions or the reporting of data; or (3) the failure or inability of a concern to engage in business practices that will promote competitiveness within a reasonable period of time.

Subparagraph (G) defines "graduation" as the removal of a firm from the program due to its substantial achievement of its targets, objectives, and goals, contained in its business plan, and its demonstrated ability to compete in the marketplace with 8(a) assistance.

SECTION 7. STAGES OF PROGRAM PARTICIPATION

This section would add three new paragraphs to section 7(j) of the Small Business Act.

Newly proposed paragraph (12) would segment the Capital Ownership Development Program into three stages: a developmental stage; a transitional stage; and a mainstreaming stage. The developmental stage would be designed to help a firm overcome its economic disadvantage by providing it assistance to access its markets and to strengthen its financial and managerial skills. A firm in the developmental stage, if otherwise eligible, is qualified to receive the following types of assistance—

(1) 8(a) contracts:

(2) Two exemptions from the "manufacturer or regular dealer" provisions of the Walsh Healey Act. This provision would waive Walsh-Healey prohibitions relating to contingent arrangements and permit a participating firm to have agreements, contingent upon the award of an 8(a) contract, to acquire machinery, equipment, facilities, or labor needed to perform the contract. Brokers would still be ineligible for an award under this paragraph as they are for other Federal contracts;

(3) Two exemptions from the bonding requirements of the Miller Act, except that exemptions from the Miller Act may be granted only if:

(a) The Administration takes appropriate measures for the protection of persons providing material and labor to such concern;

(b) The Administration assists such concern within a reasonable period of time, to obtain bonding that may subsequently be required for the successful completion of the program; and

(c) The Administration determines that the firm is unable to secure bonding either directly from a surety or through the SBA Surety Bond Guarantee Program;

(4) The transfer of technology or surplus property owned by the United States pursuant to a program to be developed in co-

operation with the heads of Federal agencies, and including the transfer by grant, license, or sale. Such technology or property must be used by the concern during its normal business operations and cannot be sold or transferred (other than to the Government) during the firm's participation in the program and for one year thereafter; and

(5) Financial assistance enabling the SBA to purchase skills training or upgrading for the employees the 8(a) concern. Such assistance is to be made by way of reimbursement to the training provider. The term "provider" means an institution of higher education, a community or vocational college or an eligible institution under the Job Training Partnership Act. The SBA shall consult with the Secretary of Labor and promulgate regulations that establish acceptable training standards and provide for such audit requirements as may be necessary to ensure the integrity of the program.

No job training assistance may be provided unless the Administrator determines that—

(a) the concern has documented that it has first explored existing cost-free or cost-subsidized training programs;

(b) no more than 5 employees or potential employees of the firm will benefit from this assistance at any one time;

(c) no more than $2,500 is made available for any one employee or potential employee;

(d) the length of training will be for at least one month and not longer than 6 months;

(e) adequate assurances from the business concern and the trainee have been received that the trainee will be employed by the concern for at least six months; (SBA is entitled to obtain repayment plus interest and costs of collection in the event of a breach, and the violator would be barred from receiving further assistance under this subparagraph);

(f) training financed under this subparagraph will take place at the recipient concern's own facilities or at an accredited institution; and

(g) adequate records are kept to insure against violations of the provisions of this subparagraph and other applicable law.

Paragraph (13) would establish the transitional stage of program participation. This stage is designed to overcome, insofar as practicable, the remaining elements of economic disadvantage. A concern in this stage, if otherwise eligible, would be qualified to receive—

(1) 8(a) contracts;

(2) Technology and surplus property transfers;

(3) Financial assistance; and

(4) Joint venture exemptions from anti-trust laws.

The financial assistance authorized is in lieu of business development expense (BDE) grants. The new paragraph would establish two new loan programs—a guarantee program and a direct loan program. The guarantee program would provide an 85% guarantee. The government's exposure would be limited to $500,000. The direct and immediate participation loans would be made at an interest rate that does not exceed the cost of money to the government and may carry a term of up to 25 years. A direct loan may not exceed $500,000, and cannot be made unless it is shown that a

guaranteed loan and an immediate participation loan are not available. Before either a guarantee or a direct loan is made, SBA must determine that—(1) the financing is not available from other sources; (2) with such assistance the concern has a reasonable prospect for operating soundly; (3) the proceeds of the loan will be used to acquire "hard assets", such as plant, equipment and material, or will be used as working capital in manufacturing concerns; and (4) such assistance will be of such sound value as to reasonably assure that the concern will fulfill the terms of the loan agreement. Finally, a new revolving fund would be established in the Treasury Department fo finance these loan programs. BDE funds not previously committed would be transferred to the fund and such additional amounts as may be needed for the new programs are authorized to be appropriated.

The new paragraph also provides for anti-trust exemptions for a joint venture agreement between an 8(a) firm and any other business concern, provided that prior written approval of the venture is received from the Attorney General and the SBA Administrator. Small business status is not forefeited solely because an 8(a) concern is a party to the joint venture agreement. The joint venture formulated under this subparagraph is eligible for contracts under the programs authorized by the Small Business Act only if it is otherwise eligible in the absence of this subparagraph. In other words, the joint venture must meet the eligibility requirements of each program under which contracts are sought. Joint venture agreements approved under this provision may not be in effect for a period of time longer than a concern's remaining time in the program, measured from the effective date of the agreement, plus an additional period of three years.

Paragraph (14) would establish the mainstreaming stage of program participation. This stage is designed to incorporate a small business into the mainstream economy with the maximum practicable opportunity to become fully competitive. Firms in the mainstreaming stage, if otherwise eligible, would be qualified to receive—

(1) 8(a) contracts;
(2) Technology and surplus property transfer;
(3) Financial assistance; and
(4) Such other management and technical assistance as SBA may deem appropriate.

SECTION 8. TIME LIMITATIONS

This section would add a new paragraph (15) to section 7(j) of the Small Business Act. The new paragraph would establish a maximum program participation term of 9 years of which no more than 4 years may be spent in the developmental stage; 3 years in the transitional stage; and 2 years in the mainstreaming stage.

SECTION 9. DATA COLLECTION

This Amendment would add a new paragraph (16) to section 7(j) of the Small Business Act. The new paragraph would require SBA to develop and implement a process for the systematic collection of data relating to the program. Not later than April 30 of each year,

the SBA must submit a report to Congress on the program that includes—

(1) The average net worth of individuals found to be eligible for the program during the preceding fiscal year, broken down in $50,000 increments (the first report must include a similar breakdown of all program participants);

(2) A description and estimate of the benefits and costs of the program during the preceding year;

(3) A description of the firms that have exited the program during the preceding year;

(4) Statistical data on the program benefits and program participants;

(5) The 8(a)/non-8(a) contract mix for every firm in each of their nine years of program participation;

(6) A description of the resources needed to operate the program over the upcoming two year period; and

(7) The total value of contracts and options awarded during the preceding year broken down by four digit standard industrial classification codes.

The first report required by this section would pertain to fiscal year 1988.

SECTION 10. CONTRACT SELECTION APPEALS AND DOCUMENTATION

Subsection (a) would amend section 8(a)(1)(A) of the Small Business Act to provide additional authority for SBA to appeal to the appropriate agency head a contracting officer's negative decision regarding the selection of a requirement for award under the 8(a) program.

Subsection (b) would amend section 8(a)(1) of the Small Business Act to provide that a contracting officer must document the contract file whenever the buying agency fails to successfully conclude negotiations with an 8(a) firm and when the agency refuses SBA's request that a particular contract be awarded under 8(a).

SECTION 11. COMPETITIVE THRESHOLDS AND CONTRACT DISTRIBUTION

This section would amend section 8(a)(1) of the Small Business Act by adding a new subparagraph (E). The new subparagraph would require competition among all responsible 8(a) firms if there is a reasonable expectation that at least two such concerns will submit offers at fair market prices and the proposed award will likely exceed $2 million (including options) if for manufacturing, construction, services or retail and $1 million (including options) in all other cases.

With respect to sole source contracts, SBA is to ensure that firms do not receive an amount of such contracts that will create an unreasonable reliance on sole source awards. In addition, SBA is to ensure that there is a fair distribution of sole source contracts among firms in similar circumstances.

Each Federal agency and SBA are to develop a simplified procurement method that allows for the expedited receipt and evaluation of competitive 8(a) proposals.

With respect to both competitive and non-competitive 8(a) contracts, SBA is required to seek an equitable geographic distribution of awards to the maximum extent practicable.

SECTION 12. FAIR MARKET PRICE

This section would amend section 8(a)(3) of the Small Business Act. It requires an 8(a) firm selected by SBA to negotiate for a sole source contract shall, when practicable, participate in contract negotiations.

Newly proposed subparagraph (B) provides that a fair market price for the award of an 8(a) contract shall be based on "reasonable costs under normal competitive conditions".

If a procurement selected for the 8(a) program is new or does not have a satisfactory procurement history, a price or cost analysis is to be conducted by the procuring agency for the purpose of estimating a fair market price. The price or cost analysis may consider prevailing market conditions, commercial prices for similar products or services, or data available from other agencies. The analysis must consider data provided by SBA and any 8(a) firm SBA may designate to perform the contract.

If the procurement has a satisfactory procurement history, the agency shall base its estimate of a current fair market price on recent award prices. The agency is further directed, however, that such recent award prices are to be adjusted to insure comparability. Factors to be considered in the adjustment are: differences in quantities, performance time, plans, specifications, transportation costs, packaging and packing costs, labor and material costs, overhead costs, and any other appropriate costs. In addition, SBA is permitted to request and receive information and data upon which an agency has established its fair market price estimate. Fair market price determinations, however, shall not be disclosed to any 8(a) firm prior to or during negotiations.

Further, a statutory right is created for the concern to receive a detailed written statement of the method used by the agency to establish the fair market price (FMP), and the concern may submit a protest to the SBA Administrator if the firm believes that these statutory guidelines concerning FMPs were violated. The Administrator has 10 days to decide such a protest. If the decision is in favor of the concern, SBA must file an appeal with the head of the buying agency. The contract action is to be suspended pending the disposition of the appeal unless the contracting officer determines that award must be made to protect the public interest.

SECTION 13. PROGRAM ADMISSION

Subsection (a) of this section would amend section 8(a)(4) of the Small Business Act to add three new subparagraphs.

Subparagraph (C) would provide that individuals could only use their eligibility once for the 8(a) program.

Subparagraph (D) would provide that once a concern has exited the program it cannot be readmitted.

Subparagraph (E) would provide that the disadvantaged owners of presently certified 8(a) firms may sell their business to new disadvantaged owners; but that in such a case, the new owners would

only be given the remainder of the program time limitation unused by the first owners.

Subsection (b) would amend section 8(a)(8) of the Small Business Act.

Subparagraph (A) would provide that all decisions regarding whether a group is disadvantaged for purposes of the program shall be made by the Administrator after consultation with the Associate Administrator for Minority Small Business and Capital Ownership Development.

Subparagraph (B) would provide that 8(a) applications are to be processed within 90 days after the expiration as designated by SBA each year. Applicants are to be advised by SBA, in writing, of the date of receipt of their application. All applicants would be entitled to a written statement from SBA detailing those documents or omissions that needed to be submitted or corrected to constitute a completed application.

Subparagraph (C) would require SBA to designate a 60 day period each year for the receipt of applications. Applications may only be accepted during that period unless the Administrator determines, on a case-by-case basis, that a particular application should be accepted to prevent an injustice to an applicant or potential applicant.

Subparagraph (D) provides that SBA is to process 8(a) applications in a manner that allows it to determine the industrial and geographic distribution of applicants, their relative potential to succeed in the program, and the availability of resources and contract opportunities to service the needs of new program entrants.

Subsection (c) would amend section 8(a)(10) of the Small Business Act to require SBA to make a sustained and substantial effort to solicit 8(a) applications from concerns located in areas of high unemployment.

SECTION 14. DUE PROCESS RIGHTS

This section would amend section 8(a)(9) of the Small Business Act. The new subparagraphs provide that an 8(a) concern shall be entitled to a hearing on the record prior to any action for termination or graduation or in the event that the Administrator fails to issue a waiver to the contract performance requirements of section 16(c) of this bill. The Administrator's proposed action is to be sustained unless it is found to be arbitrary, capricious or contrary to law. A decision rendered by an administrative law judge (ALJ) under this section is to be the final decision of the agency; however, the ALJ may decline to accept jurisdiction if—(1) the matter submitted does not, on its face, allege facts that, if true, would warrant remedial action; (2) the matter is untimely filed; (3) the matter is not filed in accordance with the rules of procedure governing such proceedings; or (4) the matter has been decided by or is the subject of an adjudication before a court of competent jurisdiction. Proceedings under this section and a decision on the merits would have to be issued, insofar as practicable, within 90 days after a petition for a hearing is filed.

SECTION 15. CONTRACT REQUIREMENTS

Subsection (a) of this section would amend section 8(a)(12) of the Small Business Act to provide that the Associate Administrator for Minority Small Business and Capital Ownership Development submit, no less frequently than annually, an estimate of the dollar amounts of both competitive and sole source contracts needed for the program, to every agency that participates in the program.

Subsection (b) would add a new paragraph (15) to section 8(a). The new paragraph pertains to the rate of 8(a) contract support and requires every 8(a) firm to have in its business plan approved 8(a) support levels for each year that it participates in the program as well as an estimate of total sales it expects to make outside of the 8(a) program. The 8(a) concern shall, with the assistance of SBA, take such actions as may be appropriate to reach a goal of 35 percent non-8(a) sales by the end of a firm's fifth year in the program and 75 percent by the end of the ninth year. These goals may, in the discretion of the SBA, be modified for concerns that will have been in the program for a period of longer than 3 years as of the effective date of this new paragraph.

Subparagraph (B) of the newly proposed paragraph (15) would specify that no 8(a) contracts may be awarded to other than small businesses and that no award can be made if it would exceed the SBA approved 8(a) support level.

Subparagraph (C) provides that the support level cannot, for any three year period, be set at a level that would, by itself, cause the small business to exceed the size standard for its primary industry.

Subparagraph (D) provides that for industries having a size standard based upon numbers of employees the maximum support level is to be computed by multiplying the size standard by the average dollar value of receipts per employee, as determined by available census data.

Subsection (c) would amend section 8(a) of the Small Business Act by adding a new paragraph (16) dealing with contract matching. Under the terms of the provision, if an 8(a) requirement is offered to SBA and the buying agency nominates an awardee, or if an 8(a) firm causes the requirement to be offered to SBA, the concern is to receive that award if—(1) it is a responsible contractor; (2) the award would be in accord with the targets, objectives and goals of its approved business plan; and (3) the award would not exceed the amounts that would trigger a competitive 8(a) award. SBA is to equitably allocate contract requirements when there is no nominated 8(a) source or when there is no concern that caused the buying agency to offer the requirement to SBA.

Subsection (d) would amend sections 8(a)(14) and section 15(o) of the Small Business Act. These amendments repeat existing provisions of law, with some technical changes, relating to permissible amounts of subcontracting under small business set-asides and 8(a) contracts. In the case of contracts for services (except construction), at least 50 percent of the cost incurred for personnel is to be expended for employees of the awardee concern. In the case of contracts for supplies, the concern must perform work for at least 50 percent of the cost of manufacturing (not including the cost of materials). These percentages may be changed by SBA to reflect con-

ventional industry practices and the agency is to set special percentages for the construction industry.

Subsection (e) would amend section 8(a)(1) of the Small Business Act by adding a new subparagraph (F). The new subparagraph would require SBA, to the maximum extent practicable, to eliminate excessive delay and paperwork and to make substantial and sustained efforts to achieve, on average, a 10 day period for approving options and modifications to 8(a) contracts.

SECTION 16. FRAUD, WASTE AND ABUSE

Subsection (a) would add two new paragraphs to section 8(a) of the Small Business Act. Newly proposed paragraph (18) would prohibit any person within the employ of SBA, and for a period of two years thereafter, from (1) buying, selling or receiving any stock or other ownership interest, or the right to acquire such an interest; (2) making or carrying out of any agreement to purchase or obtain an interest described in (1); or (3) receiving any other benefit or right that may reasonably be considered an incident of ownership from any concern participating in the program. Any person who violates these provisions would be subject to a civil penalty, assessed by the Attorney General, that cannot exceed 300 percent of the gain that the employee (or former employee) realized or could have realized by engaging in the proscribed activities.

Paragraph (19) would preclude any SBA employee who has authority to take, direct others to take, recommend, or approve any action with respect to 8(a) or 7(j), from exercising that authority or threatening to exercise that authority on the basis of the political activity or affiliation of any party. Every SBA employee would also be under an obligation to report to the Inspector General any such action for which the employee's participation had been solicited. A violation of this prohibition would make the employee subject to disciplinary action; however, if the Administrator or Deputy Administrator violate this provision, separation from service would be mandatory. These penalties are in addition to and not in lieu of any others that may be imposed under other provisions of law dealing with this subject matter.

Subsection (b) would amend section 8(a) of the Small Business Act by adding a new paragraph (20). The new paragraph (20) would require every 8(a) firm to report to SBA, on a quarterly basis, the names of and amount of compensation paid to any agents, representatives, attorneys, accountants, or consultants, other than employees, retained by the firm to help it secure Federal contracts. The reporting firms must also provide a description of the activities performed by such individuals in return for the compensation received. Any suspicion of improper activity is to be reported to the Inspector General. Concerns that fail to submit such reports in a timely manner (30 days after the date due) are to be reported to House and Senate Committees on Small Business.

Subsection (c) would amend section 8(a) of the Small Business Act by adding a new paragraph (21). The newly proposed paragraph would require that 8(a) contracts and options be performed by the firm that initially receives the contract. If the owners upon whom eligibility was based relinquish ownership or control, or

enter into any agreement to do so, the contract is to be terminated for the convenience of the government. The Administrator, as a matter of discretion, may waive these provisions if a waiver is requested before ownership or control is relinquished and if either of the following two circumstances are present—(1) exceptional circumstances manifest a hardship on the owners and the failure to provide a waiver would substantially harm the public interest, or (2) when it is necessary for the owners to surrender partial control on a temporary basis in order to obtain equity financing.

Subsection (d) would amend section 16(d) of the Small Business Act. The amendment would increase the criminal penalties for misrepresentation of small or small disadvantaged business status in order to receive a contract or subcontract subject to any of the provisions of the Small Business Act from $50,000 to $500,000, and from 5 years to 10 years imprisonment.

Subsection (e) would amend section 10(e) of the Small Business Act. The amendment would clarify that section 10(e) of such Act applies to the Inspector General. In addition, a new paragraph is added dealing with Congressionally requested investigations of the 7(j) or 8(a) programs. Under this new paragraph, either House or Senate Committees on Small Business may request that the Inspector General conduct an investigation of any program or activity conducted under the authority of section 7(j) or 8(a). The Inspector General has 15 days to--(1) inform the Committee in writing of the length of time needed to complete the investigation, or (2) provide a written detailed explanation of the reasons why the request is denied. The Inspector General must keep the Committee duly informed of the status of its investigation, and shall submit a report to the requesting Committee.

Subsection (f) would amend section 4(b)(1) of the Small Business Act to provide that the Associate Administrator for Minority Small Business and Capital Ownership Development be a career status employee and not a political appointee.

SECTION 17. "NON-MANUFACTURER RULE"

This section would amend section 8(a) of the Small Business Act by adding a new paragraph (22). The new paragraph provides that for both small business set-asides and 8(a) contracts, the offer of a small business may not be excluded solely for the reason that such business concern is not the manufacturer or processor of the product being sold under the contract as long as the concern—(1) is engaged primarily in wholesale or retail trade, (2) is a regular dealer in the product, as defined by the Walsh-Healey Act, or is exempt from the regular dealer requirement under provisions of 7(j)(12)(B) (see Section 7 above), and (3) will supply the end product of a domestic small business. If there are no small business manufacturers or processors participating in the Federal market, this last provision may be waived. The requirement that the product must be manufactured or processed by a domestic (U.S.) firm will, however, remain.

SECTION 18. SUBCONTRACTING PROGRAM

This section would amend section 8(d) of the Small Business Act dealing with the subcontracting program for small and small disadvantaged business. Section 8(d) of the Small Business Act presently requires all Federal contracts above certain dollar thresholds to provide for the maximum practicable participation of small and small disadvantaged business concerns as subcontractors, and to include subcontracting plans containing goals. The plan is a material part of the contract to which it pertains. This subsection would amend subparagraph (E) of section 8(d)(4) by adding a new clause that provides for liquidated damages in the event that a prime contractor fails to comply in good faith with its plan.

SECTION 19. RELATIONSHIP WITH OTHER PROCUREMENT PROGRAMS

This section would amend section 15(m) of the Small Business Act to require the Department of Defense, when implementing the requirements of section 1207 of Public Law 99-661 (relative to the 5 percent procurement goal for small disadvantaged business participation) to ensure that there will be no reduction in the value of small business set-asides and section 8(a) contracts nor change in the procurement processes relative to these programs. This section also increases the duties of SBA procurement center representatives (PCR), including break-out procurement center representatives, by requiring such employees to monitor compliance with this requirement and to report instances of noncompliance. The PCRs are to utilize their authority to increase the number and dollar value of contracts available for small business set-asides (section 15), section 8(a), and section 1207 awards. Additionally, with respect to those procurement programs established under section 1207, a small business concern is allowed to exceed its established size standard by 25 percent or less and still retain its small business status.

SECTION 20. STANDARD INDUSTRIAL CLASSIFICATION CODE LIMITATIONS

This section would amend section 8(a)(7) of the Small Business Act by adding a new subparagraph (B). The new provision would provide that SBA regulations regarding the approval of industry areas for 8(a) firms should not be applied in a manner that inhibits the logical business progression of 8(a) concerns into industries where the concern has a potential for success.

SECTION 21. DIRECTORS OF SMALL AND DISADVANTAGED BUSINESS UTILIZATION

This section would amend section 15(k) of the Small Business Act to provide that the directors are to report directly to the head of an agency or that person's deputy. In addition, the directors are to make recommendations as to whether a particular requirement should be a small business set-aside, an 8(a) contract or a section 1207 award. The failure of a contacting officer to accept such a recommendation must be documented and included within the appropriate contract file.

SECTION 22. REGULATIONS

This section would require SBA—

(1) To conduct public meetings of present and potential 8(a) firms to ascertain and consider comments on regulations needed to implement the Act within 60 days after the effective date of this Act;

(2) Publish proposed rules and regulations in the Federal Register within 120 days after the effective date of this Act;

(3) Publish final rules and regulations in the Federal Register within 210 days after the effective date of this Act.

SECTION 23. EMPLOYEE TRAINING AND EVALUATION

This section would mandate that no person may perform the functions of a Business Opportunity Specialist (BOS) without first receiving training on the operations and purposes of the Capital Ownership Development Program. Ninety day waivers may be granted to this training requirement for new BOSs and those recently classified or assigned as a BOS. Furthermore, in addition to their other duties, BOSs are to perform contract negotiations and to be trained and qualified to perform such responsibilities. To the extent practicable, they are to be evaluated on how well their assigned portfolio of firms is achieving competitiveness.

SECTION 24. MISCELLANEOUS AND TECHNICAL PROVISIONS

Subsection (a) of this section would require annual GAO reports on the 8(a) program.

Subsection (b) would repeal section 106 of Public Law 96-481 relating to fixed program participation terms.

Subsection (c) would exempt 8(a) firms owned by Indian tribes from the 8(a) competitive thresholds established by section 11.

Subsection (d) would provide that requirements that had been price competed before the effective date of the Act are to remain competed if there is a reasonable expectation that at least two responsible small business concerns will continue to submit offers at fair market prices.

Subsection (e) requires that the government make substantial and sustained efforts to negotiate prices on unpriced options contained in 8(a) contracts during the 60 day period which follows the date of enactment of the bill. Buying agencies are not to award the requirement to another party during that 60 day period unless it is necessary to protect the public interest. SBA is to give appropriate notice to business concerns and government agencies affected by this requirement.

SECTION 25. AUTHORIZATIONS

For FY 1988, would authorize to be appropriated $4,735,000 to implement sections 20, 23, and 24. Of this amount, $735,000 would be used for the hire of additional Procurement Center Representatives and $2,765,000 for the hire of new Business Opportunity Specialists.

SECTION 26. EFFECTIVE DATES

Except as otherwise provided, this Act would become effective one year after the date of enactment. Sections 5, 12, 19, 20, 21, 22, and 23 would become effective on the date of enactment.

SECTION 27. REVIEW OF COMPETITIVE THRESHOLDS

Subsection (a) would require the submission of three annual reports (starting one year after the date of enactment) by the Comptroller General on the competitive thresholds established by section 11. The report would contain a specific determination of whether section 11 has furthered the business development purposes of the Act as well as recommendations for competitive procurement techniques as may be needed to further such purposes.

Subsection (b) provides that seciton 11 shall cease to be effective one year after the last report, submitted under (a), if (1) the GAO determines that section 11 has impeded business development, and (2) a Joint Resolution is enacted agreeing with the GAO's finding and providing for a new competitive system for 8(a) firms.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SMALL BUSINESS ACT

* * * * * * *

SEC. 2. (a) * * *

* * * * * * *

(c)(1) The assistance programs authorized by sections 7(i) and 7(j) of this Act are to be utilized to assist in the establishment, preservation, and strengthening of small business concerns and improve the managerial skills employed in such enterprises, with special attention to small business concerns (1) located in urban or rural areas with high proportions of unemployed or low-income individuals; or (2) owned by low-income individuals; and to mobilize for these objectives private as well as public managerial skills and resources.

(2)(A) With respect to the programs authorized by section 7(j) of this Act, the Congress finds—

(i) * * *

* * * * * * *

(v) that the power to let [sole source] Federal contracts pursuant to section 8(a) of the Small Business Act can be an effective procurement assistance tool for development of business ownership among groups that own and control little productive capital; and

* * * * * * *

[(B) It is, therefore, the purpose of the programs authorized by section 7(j) of this Act to—

[(i) foster business ownership by individuals in groups that own and control little productive capital; and

[(ii) promote the competitive viability of such firms by creating a small business and capital ownership development program to provide such available financial, technical, and management assistance as may be necessary.]

(B) It is, therefore, the purpose of the programs authorized by section 7(j) of this Act to—

(i) foster business ownership and development by individuals in groups that own and control little productive capital; and

(ii) promote the competitive viability of such firms in the marketplace by creating a small business and capital ownership development program to provide such available financial, technical, and management assistance as may be necessary.

* * * * * * *

[(2) It is, therefore, the purpose of section 8(a) to—

[(A) foster business ownership by individuals who are both socially and economically disadvantaged;

[(B) promote the competitive viability of such firms by providing such available contract, financial, technical, and management assistance as may be necessary; and

[(C) clarify and expand the program for the procurement by the United States of articles, equipment, supplies, services, materials, and construction work from small business concerns owned by socially and economically disadvantaged individuals.]

(2) It is, therefore, the purpose of section 8(a) to—

(A) promote the business development of small business concerns owned and controlled by socially and economically disadvantaged individuals so that such concerns can compete on an equal basis in the American economy;

(B) promote the competitive viability of such concerns in the marketplace by providing such available contract, financial, technical, and management assistance as may be necessary; and

(C) clarify and expand the program for the procurement by the United States of articles, supplies, services, materials, and construction work from small business concerns owned by socially and economically disadvantaged individuals.

* * * * * * *

SEC. 4. (a) * * *

(b)(1) The management of the Administration shall be vested in an Administrator who shall be appointed from civilian life by the President, by and with the advice and consent of the Senate, and who shall be a person of outstanding qualifications known to be familiar and sympathetic with small-business needs and problems. The Administrator shall not engage in any other business, vocation or employment than that of serving as Administrator. In carrying out the programs administered by the Small Business Administration including its lending and guaranteeing functions, the Administrator shall not discriminate on the basis of sex or marital status

against any person or small business concern applying for or receiving assistance from the Small Business Administration, and the Small Business Administration shall give special consideration to veterans of the Armed Forces of the United States and their survivors or dependents. The Administration is authorized to appoint a Deputy Administrator and four Associate Administrators (including the Associate Administrator specified in section 201 of the Small Business Investment Act of 1958) to assist in the execution of the functions vested in the Administration.[1] One of the Associate Administrators shall be designated at the time of his appointment as the Associate Administrator for Minority Small Business and Capital Ownership Development *who shall be an employee in the competitive service or in the Senior Executive Service and a career appointee* and shall be responsible to the Administrator for the formulation and execution of the policies and programs under sections 7(j) and 8(a) of this Act which provide assistance to minority small business concerns.

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SEC. 7. (a) * * *

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(j)(1) * * *

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(8) The General Accounting Office shall provide for an independent and continuing evaluation of programs under sections 7(i), 7(j), and 8(a) of this Act, including full information on, and analysis of, the character and impact of managerial assistance provided, the location, income characteristics, and extent to which private resources and skills have been involved in these programs. Such evaluation together with any recommendations deemed advisable by the Comptroller General shall be reported to the Congress by [January 1, 1981, and at any time thereafter at the discretion of the Comptroller General.] *January 1 of each year.*

* * * * * * *

(10) There is established within the Administration a small business and capital ownership development program (hereinafter referred to as the "Program") which shall provide assistance exclusively for small business concerns eligible to receive contracts pursuant to section 8(a) of this Act. The program, and all other services and activities authorized under section 7(j) and 8(a) of this Act shall be managed by the Associate Administrator for Minority Small Business and Capital Ownership Development under the supervision of, and responsible to, the Administrator.

(A) The Program shall—

[(i) assist small business concerns participating in the Program to develop comprehensive business plans with specific business targets, objectives, and goals for correcting the impairment of such concern's ability to compete, as determined for such concern pursuant to section 8(a)(6) of this Act, within a fixed period of time as mutually agreed upon by the applicant and the Administrator prior to acceptance in such program; *Provided,* That not less than

one year prior to the expiration of such period, and upon the request of such concern, the Administration shall review such period and may extend such period as necessary and appropriate: *Provided further,* That no determination made under this paragraph shall be considered a denial of total participation for the purposes of section 8(a)(9) of this Act;]

(i) assist small business concerns participating in the program to develop comprehensive business plans with specific business targets, objectives, and goals that are realistic and within the capability of both the program and the participating concern. Such targets, objectives, and goals shall be designed to result in a competitive small business concern by eliminating those conditions or circumstances upon which the Administration originally determined eligibility pursuant to section 8(a)(6);

* * * * * * *

(v) analyze and report the causes of success and failure of small business concerns participating in the Program; [and]

(vi) provide assistance necessary to help small business concerns participating in the Program to procure surety bonds, with such assistance including, but not limited to, (I) the preparation of application forms required to receive a surety bond, (II) special management and technical assistance designed to meet the specific needs of small business concerns participating in the Program and which have received or are applying to receive a surety bond, and (III) preparation of all forms necessary to receive a surety bond guarantee from the Administration pursuant to title IV, part B of the Small Business Investment Act of 1958[.]; *and*

(vii) conduct training sessions to assist individuals and enterprises eligible to receive contracts under section 8(a) in the development of business principles and strategies to enhance their ability to successfully compete for contracts in the marketplace.

* * * * * * *

(D) A small business concern participating in any program or activity conducted under the authority of this paragraph or eligible for the award of contracts pursuant to section 8(a) on the effective date of this subparagraph shall be permitted continued participation and eligibility in such program or activity for a period of time which is the greater of—

(i) 9 years less the number of years since the award of its first contract pursuant to section 8(a); or

(ii) its original fixed program participation term (plus any extension thereof) assigned prior to the effective date of this subparagraph.

Nothing contained in this subparagraph shall be deemed to prevent the Administration from instituting a termination or grad-

uation pursuant to subparagraph (F) or (G) for issues unrelated to the expiration of any time period limitation.

(E) A small business concern participating in the program conducted under the authority of this paragraph and eligible for the award of contracts pursuant to section 8(a) shall be denied all such assistance if such concern—

(i) voluntarily elects not to participate;

(ii) has been a participant in the program for the nine-year time limit prescribed by paragraph (15);

(iii) is terminated pursuant to a termination proceeding conducted in accordance with the provisions of section 8(a)(9); or

(iv) is graduated pursuant to a graduation proceeding conducted in accordance with the provisions of section 8(a)(9).

(F) For the purposes of this Act the terms "terminated" or "termination" shall mean the total denial or suspension of assistance pursuant to this paragraph or section 8(a) prior to the graduation of the participating small business concern pursuant to subparagraph (G) or the expiration of the time limitation prescribed by paragraph (15). An action for termination shall be based upon good cause, including—

(i) the failure by such concern to maintain a standard of program eligibility;

(ii) the violation of any legal requirement by the concern regarding prohibited actions or the reporting of data; or

(iii) the failure or inability of the concern to engage in business practices that will promote its competitiveness within a reasonable period of time.

(G) For the purposes of this Act the term "graduated" or "graduation" shall mean the removal of a concern from the program and denial of contracts pursuant to section 8(a) due to such concern's substantial achievement of the targets, objectives, and goals contained in the concern's business plan and its demonstrated ability to compete in the marketplace without assistance under this paragraph or section 8(a).

* * * * * * *

(12) The Administration shall segment the Capital Ownership Development Program into three stages: a developmental stage; a transitional stage; and a mainstreaming stage. The developmental stage of program participation shall be designed to assist the concern to overcome its economic disadvantage by providing such assistance as may be necessary and appropriate to access its markets and to strengthen its financial and managerial skills. A small business concern in the developmental stage of program participation, if otherwise eligible, shall be qualified to receive the following assistance.

(A) The award of contracts pursuant to section 8(a).

(B) A maximum of two exemptions from the requirements of section 1(a) of the Act entitled "An Act providing conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes", approved June 30, 1936 (49 Stat. 2036), which exemptions shall apply only to contracts awarded pursuant to section 8(a) and shall only be used to

allow for contingent agreements by a small concern to acquire the machinery, equipment, facilities or labor needed to perform such contracts.

(C) A maximum of two exemptions from the requirements of the Act entitled "An Act requiring contracts for the construction, alteration and repair of any public building or public work of the United States to be accompanied by a performance bond protecting the United States and by additional bond for the protection of persons furnished material and labor for the construction, alteration, or repair of said public buildings or public works", approved August 24, 1935 (49 Stat. 793), which exemptions shall apply only to contracts awarded pursuant to section 8(a) of this Act, except that, such exemptions may be granted under this subparagraph only if—

(i) the Administration takes such measures as it deems appropriate for the protection of persons furnishing materials and labor to such concern;

(ii) the Administration assists, within a reasonable period of time, its ability to obtain such bonds as the Administration may subsequently require for the successful completion of the program conducted under the authority of paragraph (10); and

(iii) the Administration finds that such concern is unable to obtain the requisite bond or bonds from a surety and that no surety is willing to issue a bond subject to the guarantee provisions of title IV of the Small Business Investment Act of 1958.

(D) The transfer of technology or surplus property owned by the United States to such a concern. Activities designed to effect such transfer shall be developed in cooperation with the heads of Federal agencies and shall include the transfer by grant, license, or sale of such technology or property to such a concern without regard to any other provision of law. Such technology or property shall be used by the concern during the normal conduct of its business operations and shall not be sold or transferred to any other party (other than the Government) during such concern's term of participation in the program and for one year thereafter.

(E) Financial assistance whereby the Administration may purchase in whole or in part, and on behalf of such concerns, skills training or upgrading for employees or potential employees of such concerns. Such financial assistance may be made without regard to section 18(a) of this Act, shall be made by way of reimbursement to the training provider, and shall have such adjustments as may be necessary to provide for overpayments or underpayments. For purposes of this subparagraph the term "training provider" shall mean an institution of higher education, a community or vocational college or an institution eligible to provide skills training or upgrading under the Job Training Partnership Act. The Administration shall, in consultation with the Secretary of Labor, promulgate rules and regulations to implement this subparagraph that establish acceptable training and upgrading performance standards as may be necessary to ensure the integrity of the training effort. No finan-

cial assistance shall be granted under this subparagraph unless the Administrator determines that—

(i) such concern has documented that it has first explored the use of existing cost-free or cost-subsidized training programs offered by public and private sector agencies working with programs of employment and training and economic development;

(ii) no more than five employees or potential employees of such concern are recipients of any benefits under this subparagraph at any one time;

(iii) no more than $2,500 shall be made available for any one employee or potential employee;

(iv) the length of training or upgrading financed by this subparagraph shall be no less than one month nor more than six months;

(v) such concern has given adequate assurance it will employ the trainee or upgraded employee for at least six months after the training or upgrading financed by this subparagraph has been completed and each trainee or upgraded employee has provided a similar assurance to remain within the employ of such concern for such period; if such concern, trainee, or upgraded employee breaches this agreement, the Administration shall be entitled to and shall make diligent effort to obtain from the violating party the repayment of all funds expended on behalf of the violating party; such repayment shall be made to the Administration together with such interest and costs of collection as may be reasonable; the violating party shall be barred from receiving any further assistance under this subparagraph;

(vi) the training to be financed may take place either at such concern's facilities or at those of the training provider; and

(vii) such concern will maintain such records as the Administration deems appropriate to ensure that the provisions of this subparagraph and any other applicable law have not been violated.

(13) The transitional stage of program participation shall be designed to overcome, insofar as practicable, the remaining elements of economic disadvantage and to prepare such concern for graduation from the program. A small business concern in the transitional stage of program participation, if otherwise eligible, shall be qualified to receive assistance pursuant to this paragraph and subparagraph (D) of paragraph (12). In addition to the assistance described in the preceding sentence, a small business concern in this stage of program participation shall be eligible to receive contracts pursuant to section 8(a).

(A) The Administration shall not, except as otherwise specifically provided for in this Act, provide any grant to any concern participating in the program established by paragraph (10) for the purposes of capital equipment acquisition, price differentials, capital improvements or any other purpose.

(B) The Administration is empowered to make loans either directly or in cooperation with banks or other financial institu-

tions through agreements to participate on an immediate or deferred (guaranteed) basis to small business concerns eligible for assistance under this paragraph or paragraph (14). Such assistance may be provided only if the Administration determines that—

(i) the type and amount of such assistance requested by such concern is not otherwise available on reasonable terms from other sources;

(ii) with such assistance such concern has a reasonable prospect for operating soundly and profitably within a reasonable period of time;

(iii) the proceeds of such assistance will be used within a reasonable time for plant construction, conversion, or expansion, including the acquisition of equipment, facilities, machinery, supplies, or material; or to supply such concern with working capital to be used in the manufacture of articles, equipment, supplies, or materials for defense or civilian production or as may be necessary to insure a well-balanced national economy; and

(iv) such assistance is of such sound value as reasonably to assure that the terms under which it is provided will not be breached by the small business concern.

(C)(i) No loan shall be made under this paragraph if the total amount outstanding and committed (by participation or otherwise) to the borrower from the fund established pursuant to (E) would exceed $500,000.

(ii) Subject to the provisions of clause (i), in agreements to participate in loans on a deferred (guaranteed) basis, such participation by the Administration shall be not less than 85 per centum of the balance of the financing outstanding at the time of disbursement.

(iii) The rate of interest on financings made on a deferred (guaranteed) basis shall be legal and reasonable.

(iv) Financings made pursuant to this paragraph shall be subject to the following limitations:

(I) No immediate participation may be purchased unless it is shown that a deferred participation is not available.

(II) No direct financing may be made unless it is shown that a participation loan is unavailable.

(D) A direct loan or the Administration's share of an immediate participation loan made pursuant to this paragraph shall be any secured debt instrument—

(i) that is subordinated by its terms to all other borrowings of the issuer;

(ii) the rate of interest on which shall not exceed the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the average maturities of such loan and adjusted to the nearest one-eighth of 1 per centum;

(iii) the term of which is not more than twenty-five years; and

(iv) the principal on which is amortized at such rate as may be deemed appropriate by the Administration, and the interest on which is payable not less often than annually.

(E) There is hereby established within the Treasury a revolving fund that shall be available to the Administration, without fiscal year limitation, for financing functions performed pursuant to this paragraph. All amounts received by the Administration due to loans made or participated in on an immediate or deferred (guaranteed) basis under this paragraph shall be deposited in the fund. All expenses, including administrative expenses, resulting from making or disposing of such loans by the Administration shall be paid from the fund.

(F) There are hereby authorized to be appropriated to the fund established by subparagraph (E) such sums as may be necessary for carrying out the provisions and purposes of this paragraph relating to the making and servicing of direct, immediate participation, and guaranteed loans authorized by this paragraph. Unobligated funds previously appropriated for business development expense shall be transferred into the fund established by subparagraph (E).

(G) The Administrator may, after consultation with the Attorney General and the chairman of the Federal Trade Commission, and with the prior written approval of the Attorney General, approve any agreement between a small business concern eligible for assistance under this paragraph and any other business (whether or not eligible for assistance under this Act) for a joint venture between such concern and such business if the Administrator determines that such venture will enhance such concern's competitiveness and will strengthen the free enterprise system. The Administrator or the Attorney General may, at any time, withdraw approval of such agreement upon a finding that the agreement no longer carries out such purposes, except that no act or omission to act pursuant to or within the scope of such an approved agreement shall be construed to be within the prohibitions of the anti-trust laws or the Federal Trade Commission Act. All approvals and withdrawals made pursuant to this subparagraph shall be published in the Federal Register. No small business concern that enters into such a joint venture agreement shall be deemed to be other than a small business concern solely because it is a party to such agreement. Notwithstanding the provisions of this subparagraph, no joint venture formulated pursuant to this subparagraph shall be deemed eligible for the award of any contract or subcontract pursuant to sections 8(a), 8(d), 9, or section 15 if such joint venture would not have been eligible in the absence of such paragraph. No agreement approved pursuant to this subparagraph shall be in effect for a period longer than a concern's remaining term of participation in the program, measured from the effective date of such agreement, plus an additional period of three years.

(14) The mainstreaming stage of program participation shall be designed to incorporate a small business concern into the mainstream economy with the maximum practicable opportunity to become fully competitive. A small business concern participating in the mainstreaming stage of program participation, if otherwise eligible, shall be qualified to receive the assistance provided for by subparagraph (D) of paragraph (12) and the loan assistance established by paragraph (13). In addition to the assistance described in the pre-

ceding sentence, concerns eligible for assistance pursuant to this paragraph shall be eligible for the award of contracts pursuant to section 8(a) and such other management and technical assistance as the Administration may deem appropriate.

(15) Notwithstanding any other provision of this Act, a small business concern shall not receive any assistance pursuant to paragraphs (10), (12), (13), or (14) or section 8(a) for a total period of longer than nine years, measured from the date of certification, of which—

(A) no more than four years may be spent in the developmental stage of program participation established by paragraph (12);

(B) no more than three years may be spent in the transitional stage of program participation established by paragraph (13); and

(C) no more than two years may be spent in the mainstreaming stage of program participation established by paragraph (14).

(16)(A) The Administrator shall develop and implement a process for the systematic collection of data on the benefits derived by the economy and by socially and economically disadvantaged individuals as a result of the operations of the Capital Ownership Development Program established pursuant to paragraph (10).

(B) Not later than April 30 of each year the Administrator shall submit a report to the Congress on the Capital Ownership Development Program that shall include the following:

(i) The average personal net worth of individuals who own and control concerns that were initially certified for the receipt of contracts pursuant to section 8(a) during the immediately preceding fiscal year. The Administration shall also indicate the dollar distribution of net worths, at $50,000 increments, of all such individuals found to be socially and economically disadvantaged. For the first report required pursuant to this paragraph the Administration shall also provide the data specifed in the proceding sentence for all eligible individuals in the program as of the effective date of this paragraph.

(ii) A description and estimate of the benefits and costs that have accrued to the economy and the government in the immediately preceding fiscal year due to the operations of those business concerns that were performing work during such year as the result of any contract awarded pursuant to section 8(a). Such description and estimate shall take into account, but not be limited to, the employment and total sales of such concerns and the taxes and expenditures made by such concerns during such years as well as the costs associated with conducting the program and any other related expenses.

(iii) A compilation and evaluation of those business concerns that have exited the Capital Ownership Development Program during the immediately preceding three fiscal years. Such compilation and evaluation shall detail the number of concerns actively engaged in business operations; those that have ceased or substantially curtailed such operations, including the reasons for such actions; and those concerns that have been acquired by other firms or organizations owned and controlled by other

than socially and economically disadvantaged individuals. For those businesses that have continued operations after they exited from the Capital Ownership Development Program, the Administrator shall also separately detail the benefits and costs, as described in clause (ii), that have accrued to the economy during the immediately preceding fiscal year due to the operations of such concerns.

(iv) A listing of all participants in the Capital Ownership Development Program during the preceding year identifying, by region, for each firm: the name of the concern; the race or ethnicity, and gender of the principal owners, the dollar value of all contracts received in the preceding year; the name of the awarding agency for each such contract; the dollar amount of advance payments received by each concern; and a description including (if appropriate) an estimate of the dollar value of all benefits received pursuant to paragraphs (12), (13), and (14) during such year.

(v) The total dollar value of contracts and options awarded during the preceding fiscal year pursuant to section 8(a) and such amount expressed as a percentage of total sales of (I) all firms participating in the Capital Ownership Development Program during such year; and (II) of firms in each of the nine years of program participation.

(vi) A description of such additional resources or program authorities as may be required to provide the types of services needed over the next two-year period to service the expected portfolio of firms certified pursuant to section 8(a).

(vii) The total dollar value of contracts and options awarded pursuant to section 8(a), at such dollar increments as the Administration deems appropriate, for each four digit standard industrial classification code under which such contracts and options were classified.

(C) The first report required by subparagraph (B) shall pertain to fiscal year 1988.

* * * * * * *

SEC. 8. (a)(1) It shall be the duty of the Administration, and it is hereby empowered, whether it determines such action is necessary or appropriate—

(A) to enter into contracts with the United States Government and any department, agency, or officer thereof having procurement powers obligating the Administration to furnish articles, equipment, supplies, services, or materials to the Government or to perform construction work for the Government. In any case in which the Administration certifies to any officer of the Government having procurement powers that the Administration is competent and responsible to perform any specific Government procurement contract to be let by any such officer, such officer shall be authorized in his discretion to let such procurement contract to the Administration upon such terms and conditions as may be agreed upon between the Administration and the procurement officer. Whenever the Administration and such procurement officer fail to agree *on either the terms and conditions of such contracts or on the se-*

lection of a particular procurement requirement to be let pursuant to this subsection, the matter shall be submitted for determination to the Secretary or the head of the appropriate department or agency by the Administrator. A contract may not be awarded under this subsection if the award of the contract would result in a cost to the awarding agency which exceeds a fair market price;

(D) The contracting officer shall document the appropriate contract file with the specific reasons and supporting facts in any instance when—

(i) such officer's agency or department fails to award a contract pursuant to subparagraph (C) after negotiations had commenced; or

(ii) when the Administration's request that a particular contract requirement be awarded pursuant to this subsection is denied.

(E)(i) Contracts to be awarded pursuant to this subsection shall be competed among responsible small business concerns participating in the Capital Ownership Development Program established by section 7(j)(10) if there is a reasonable expectation that at least two such concerns will submit offers at fair market prices, and the proposed award will likely exceed $2,000,000 (including options) if for manufacturing, construction, services, or retail, and $1,000,000 (including options) in all other cases.

(ii) The Administration shall ensure, to the maximum practicable extent, that—

(I) a concern participating in the program established by section 7(j)(10) not receive a number or dollar amount of sole source contracts pursuant to this subsection that establishes an unreasonable reliance upon such contracts, pursuant to paragraph (15), to achieve such concern's business development objectives; and

(II) there is a fair distribution of available sole source contracts so that concerns in similar circumstances are treated equitably and that no concern receive a disproportionate number of awards if other similar concerns are available to perform a share of the available work.

(iii) The Administration and each agency participating in the competitive award of contracts pursuant to clause (i) shall develop a simplified procurement method that allows for the expedited receipt and evaluation of proposals.

(iv) To the maximum extent practicable, the Administration shall promote the equitable geographic distribution of contracts awarded pursuant to this subsection.

(F) The Administration shall, to the maximum extent practicable, minimize delay, eliminate excess regulation, and require only such paperwork as may be necessary to effect the orderly and efficient management of the program established by 7(j)(10)

and the award of contracts pursuant to this subsection. The Administration shall make substantial and sustained efforts to achieve a maximum ten-day period as the average processing time for approving options and modifications to existing contracts awarded pursuant to this subsection and submitted to the Administration for approval.

* * * * * * *

[(3) Any small business concern selected by the Administration to perform any Federal Government procurement contract to be let pursuant to this subsection shall, when practicable, participate in any negotiation of the terms and conditions of such contract.]

(3)(A) Any small business concern selected by the Administration to perform any sole-source contract to be let pursuant to this subsection shall, when practicable, participate in any negotiation of the terms and conditions of such contract.

(B)(i) For purposes of paragraph (1)(A) a "fair market price" shall be based on reasonable costs under normal competitive conditions.

(ii) The estimate of a current fair market price for a new procurement requirement, or a requirement that does not have a satisfactory procurement history, shall be derived from a price or cost analysis conducted by the agency offering the requirement to the Administration. Such analysis may take into account prevailing market conditions, commercial prices for similar products or services, or data obtained from any other agency. Such analysis shall consider such cost or pricing data as may be submitted by the Administration and the small business concern selected by the Administration to perform the contract.

(iii) The estimate of a current fair market price for a procurement requirement that has a satisfactory procurement history shall be formulated by the agency offering the requirement to the Administration and shall be based on recent award prices adjusted to insure comparability. Such adjustments shall take into account differences in quantities, performance times, plans, specifications, transportation costs, packaging and packing costs, labor and material costs, overhead costs, and any other additional costs which may be deemed appropriate.

(C) An agency offering a procurement requirement for potential award pursuant to this subsection shall, upon the request of the Administration, promptly submit to the Administration all information, studies, analyses, and other data used by such agency to estimate the current fair market price of such requirement. Such fair market price shall not be disclosed to any potential offeror (other than the Administration) prior to or during the negotiations for the award of such requirement.

(D) A small business concern selected by the Administration to perform or negotiate a contract to be let pursuant to this subsection shall—

(i) be entitled, upon its request, to a written statement detailing the method used by the agency to estimate the current fair

market price for such contract; and

(ii) within such time limits as may be prescribed by the Administrator, be entitled to protest the use of such method to the Administrator if such concern has reason to believe that the provisions of this paragraph have been violated. The Administrator shall consider such protest and shall have ten days from the receipt of such protest to render a final decision; if in the discretion of the Administrator the protest is sustained, an appeal shall be filed by the Administrator pursuant to section 8(a)(1)(A); the agency that is the subject of any appeal filed pursuant to such section shall not award the contract to any other party pending the disposition of the appeal unless the contracting officer determines, in writing, that an award must be made to protect the public interest.

(4)(A) * * *

* * * * * * *

(C) Any individual upon whom eligibility is based pursuant to this paragraph, shall be permitted to assert such eligibility for only one small business concern. Notwithstanding the provisions of the preceding sentence, no individual who was determined pursuant to this subsection to be socially and economically disadvantaged before the effective date of this subparagraph shall be permitted to assert such disadvantage with respect to any other concern making application for certification after such effective date.

(D) No concern, previously eligible for the award of contracts pursuant to this subsection, shall be subsequently recertified for the award of additional contracts if its prior participation in the program was concluded for any of the reasons described in section 7(j)(10)(E).

(E) A concern, eligible for the award of contracts pursuant to this subsection, shall remain eligible for such contracts if there is a transfer of ownership and control (as decribed in (A)) to individuals who would otherwise be considered socially and economically disadvantaged pursuant to this subsection. In the event of such a transfer the concern, if not terminated or graduated, shall be eligible for a period of continued participation in the program not to exceed nine years less the number of years since the award of its first contract pursuant to this subsection.

* * * * * * *

(7)*(A)* No small business concern shall be deemed eligible for any assistance pursuant to this subsection unless the Administration determines that with contract, financial, technical, and management support the small business concern will be able to perform contracts which may be awarded to such concern under paragraph (1)(C) and has reasonable prospects for success in competing in the private sector.

(B) Limitations established by the Administration in its regulations and procedures restricting the award of contracts pursuant to

this subsection to a limited number of standard industrial classification codes in an approved business plan shall not be applied in a manner that inhibits the logical business progression by a participating small business concern into areas of industrial endeavor where such concern has the potential for success.

[(8) All determinations made pursuant to paragraph (5) with respect to whether a group has been subjected to prejudice or bias shall be made by the Administrator after consultation with the Associate Administrator for Minority Small Business and Capital Ownership Development. All other determinations made pursuant to paragraphs (4), (5), (6), and (7) shall be made by the Associate Administrator for Minority Small Business and Capital Ownership Development under the supervision of, and responsible to, the Administrator.]

(8)(A) All determinations made pursuant to paragraph (5) with respect to whether a group has been subjected to prejudice or bias shall be made by the Administrator after consultation with the Associate Administrator for Minority Small Business and Capital Ownership Development.

(B) Applications for certification pursuant to this subsection shall be processed within ninety days after the expiration of the time period designated pursuant to subparagraph (C). The applicant shall be advised, in writing, by the Administration of the date of receipt of the concern's application and shall be entitled, upon written request, to receive from the Administration a written list of those documents or omissions that need to be submitted or corrected in order to constitute a completed application. The Administration shall comply with such request in a timely fashion.

(C) The Administration shall designate a sixty consecutive day period during each year during which it shall accept applications for certification pursuant to this subsection. Applications may only be accepted during such designated period, unless the Administrator determines, on a case-by-case basis, that a waiver should be issued to prevent an injustice to an applicant or potential applicant for the program.

(D) Applications received during the sixty-day period specified in subparagraph (C) shall be processed in a manner that allows the Administration to determine, insofar as practicable, the industrial and geographic distribution of applicants, their relative potential to succeed in the program, and the availability of resources and contract opportunities to service the needs of new program entrants.

[(9) Within ninety days after the effective date of this paragraph, the Administration shall publish in the Federal Register rules setting forth those conditions or circumstances pursuant to which a firm previously deemed eligible by the Administration may be denied assistance under the provisions of this subsection: *Provided,* That no such firm shall be denied total participation in any program conducted under the authority of this subsection without first being afforded a hearing on the record in accordance with chapter 5 of title 5, United States Code.]

(9)(A) Subject to the provisions of subparagraph (E), the Administrator, prior to taking any action described in subparagraph (B), shall provide the small business concern that is the subject of such action, an opportunity for a hearing on the record, in accordance with chapter 5 of title 5, United States Code.

(B) The actions referred to in subparagraph (A) are—

(i) a termination pursuant to section 7(j)(10)(F);

(ii) a graduation pursuant to section 7(j)(10)(G); and

(iii) the denial of a request to issue a waiver pursuant to paragraph (21)(B).

(C) The Administrator's proposed action, in any proceeding conducted under the authority of this paragraph, shall be sustained unless it is found to be arbitrary, capricious, or contrary to law.

(D) A decision rendered pursuant to this paragraph shall be the final decision of the Administration and shall be binding upon the Administration and those within its employ.

(E) The adjudicator selected to preside over a proceeding conducted under the authority of this paragraph shall decline to accept jurisdiction over any matter that—

(i) does not, on its face, allege facts that, if proven to be true, would warrant reversal or modification of the Administration's position;

(ii) is untimely filed;

(iii) is not filed in accordance with the rules of procedure governing such proceedings; or

(iv) has been decided by or is the subject of an adjudication before a court of competent jurisdiction over such matters.

(F) Proceedings conducted pursuant to the authority of this paragraph shall be completed and a decision rendered, insofar as practicable, within ninety days after a petition for a hearing is filed with the adjudicating office.

(10) The Administration shall develop and implement an outreach program to inform and recruit small business concerns to apply for eligibility for assistance under this subsection. *Such program shall make a sustained and substantial effort to solicit applications for certification from small business concerns located in areas of concentrated unemployment or underemployment or within labor surplus areas.*

* * * * * * *

(12) To the maximum extent practicable the Associate Administrator for Minority Small Business and Capital Ownership Development shall submit, no less frequently than annually, a yearly estimate of the dollar amounts and types of *sole source and competitive* contracts required for the efficient use of any program conducted under the authority of this subsection, to each agency which may participate in such program.

* * * * * * *

[(14)(A) A concern may not be awarded a contract under this subsection as a small business concern unless the concern agrees that—

[(i) in the case of a contract for services (except construction), at least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern; and

[(ii) in the case of a contract for procurement of supplies (other than procurement from a regular dealer in such supplies), the concern will perform work for at least 50 percent of the cost of manufacturing the supplies (not including the cost of materials).

[(B) The Administrator may change the percentage under clause (i) or (ii) of subparagraph (A) if the Administrator determines that such change is necessary to reflect conventional industry practices among business concerns that are below the numerical size standard for business in that industry catagory. A percentage established under the preceeding sentence may not differ from a percentage established under section 15(o).

[(C) The Administration shall establish, through public rulemaking, requirements similar to those specified in subparagraph (A) to be applicable to contracts for general and specialty construction and to contracts for any other industry category not otherwise subject to the requirements of such subparagraph. The percentage applicable to any such requirement shall be determined in accordance with subparagraph (B), except that such a percentage may not differ from a percentage established under section 15(o) for the same industry category.]

(14)(A) A concern may not be awarded a contract under this subsection as a small business concern unless the concern agrees that—

(i) in the case of a contract for services (except construction), at least 50 per centum of the cost of contract performance incurred for personnel shall be expended for employees of the concern; and

(ii) in the case of a contract for procurement of supplies (other than procurement from a regular dealer in such supplies), the concern will perform work for at least 50 per centum of the cost of manufacturing the supplies (not including the cost of materials).

(B) The Administrator may change the percentage under clause (i) or (ii) of subparagraph (A) if the Administrator determines that such change is necessary to reflect conventional industry practices among business concerns that are below the numerical size standard for business in the industry category. A percentage established under the preceding sentence may not differ from a percentage established under section 15(o).

(C) The Administration shall establish, through public rulemaking, requirements similar to those specified in subparagraph (A) to be applicable to contracts for general and specialty construction and to contracts for any other industry category not otherwise subject to

the requirements of such subparagraph. The percentage applicable to any such requirement shall be determined in accordance with subparagraph (B), expect that such a percentage may not differ from a percentage established under section 15(o) for the same industry category.

(15)(A) The business plan required pursuant to section 7(j)(10) shall contain an estimated dollar support level, approved by the Administration, of all contracts to be awarded pursuant to this subsection during each year of a small business concern's participation in the program established under section 7(j)(10). Such estimated level shall be known as the section 8(a) contract support level. For each year with such a support level, such concern shall also specify the anticipated total sales it expects to make without counting awards made pursuant to this subsection. The concern shall take such measures as may be appropriate and necessary to reach a goal of 35 per centum of total sales resulting from other than contracts awarded pursuant to this subsection by the end of the fifth year of such concern's participation in the program. By the last year of the mainstreaming stage of program participation, such goal shall be 75 per centum. The goals specified in the preceding two sentences may, in the discretion of the administration, be modified for those concerns that had participated in the Capital Ownership Development Program for a period of longer than three years on the effective date of this subparagraph. Subject to the requirements of subparagraph (B), the Administration shall assist each concern participating in the program to obtain the goals established by the preceding two sentences.

(B) The requirements referred to in subparagraph (A) are—

(i) no award shall be made pursuant to this subsection to other than a small business concern; and

(ii) no award shall be made pursuant to this subsection if such award would cause the small business concern to exceed its approved 8(a) contract support level for the relevent fiscal year that was established pursuant to subparagraph (A).

(C) The support level established pursuant to subparagraph (A) shall not, for any three-year period, be set at a level that would, by itself, cause the small business concern to exceed the applicable size standard for its primay industry if it actually was awarded such a level of contracts.

(D) When implementing the requirements of subparagraph (C) for industries with size standards based upon numbers of employees, the Administration shall ascertain from the most recently available census data the average dollar value of recipts per employee in each such industry. The multiplication of such value by the relevant size standard shall be used to measure the compliance of such industries with the requirements of subparagraph (C).

(16) If a contract requirement is offered to the Administration for potential award pursuant to this subsection and the agency offering such requirement nominates an eligible small business concern to perform such contract, of if an eligible small business concern first identifies a contract requirement and causes the agency to offer such requirement and causes the agency to offer such requirement to the Administration for award pursuant to this subsection, the Adminis-

tration shall, in either event, designate such concern for the negotiation of such requirement if—

(A) the concern is a responsible contractor for such proposed award:

(B) the award of the requirement would be in accord with the targets, objectives, and goals contained in such concern's approved business plan; and

(C) the award would not exceed the amounts specified in subsection (a)(1)(E)(i).

(17)(A) If contract requirements are offered to the Administration for potential award pursuant to this subsection, and eligible small business concerns are neither nominated for award nor identified as causing the agency to offer the requirements to the Administration, such requirements shall be equitably allocated by the Administration.

(18)(A) No person within the employ of the Administration shall, during the term of that employment and for a period of two years after such employment has been terminated, engage in any activity or transaction specified in subparagraph (B) with respect to any concern that was certified pursuant to this subsection during such person's term of employment.

(B) The activities and transactions referred to in subparagraph (A) are—

(i) the buying, selling or receipt of any legal or beneficial ownership of stock or any other ownership interest or the right to acquire any such interest;

(ii) the making or carrying out of a written or oral agreement (whether or not legally enforceable) to purchase or otherwise obtain any right or interest described in clause (i); and

(iii) the receipt of any other benefit or right that may reasonably be considered an incident of ownership.

(C) Any present or former employee of the Administration who violates this paragraph shall be subject to a civil penalty, assessed by the Attorney General, that shall not exceed 300 per centum of the maximum amount of gain such employee realized or could have realized as a result of engaging in those activities and transactions proscribed by subparagraph (B).

(19)(A) Any employee of the Administration who has authority to take, direct others to take, recommend, or approve any action with respect to any program or activity conducted pursuant to this subsection or section 7(j), shall not, with respect to any such action, exercise or threaten to exercise such authority on the basis of the political activity or affiliation of any party. Employees of the Administration shall expeditiously report to the Inspector General of the Administration any such action for which such employee's participation has been solicited or directed.

(B) Any employee who willfully and knowingly violates subparagraph (A) shall be subject to disciplinary action, imposed by the Administrator, which may consist of separation from service, reduction in grade, suspension, or reprimand.

(C) Any person holding the position of Administrator or Deputy Administrator who willfully and knowingly violates subparagraph (A) shall be separated from service.

(D) Subparagraph (A) shall not apply to any action taken as a penalty or other enforcement of a violation of any law, rule, or regulation prohibiting or restricting certain political activity.

(E) The prohibitions of subparagraph (A), and remedial measures provided for under subparagraphs (B) and (C) with regard to such prohibitions, shall be in addition to, and not in lieu of, any other prohibitions, measures or liabilities that may arise under any other provision of law.

(20)(A) Small business concerns participating in the program conducted under the authority of section 7(j)(10) and eligible to receive contracts pursuant to this subsection shall submit to the Associate Administrator for Minority Small Business and Capital Ownership Development at least once during each three-month period during such concern's term of participation—

(i) a listing of any agents, representatives, attorneys, accountants, consultants, and other parties (other than employees) receiving compensation from such concern to assist in obtaining Federal contracts for such concern; and

(ii) the amount of compensation received by the parties identified pursuant to subparagraph (A) over the relevant reporting period and a description of the activities performed in return for such compensation.

(B) Such Associate Administrator shall immediately report to the Inspector General of the Administration any suspicion of improper activity ascertained from a review of any report received under this paragraph.

(C) The Associate Administrator shall report to the Committees on Small Business of the Senate and the House of Representatives the names of those concerns that have failed to submit a report under this paragraph within thirty calendar days after such report is due.

(21)(A) Subject to the provisions of subparagraph (B), a contract (including options) awarded pursuant to this subsection shall be performed by the concern that initially received such contract. Notwithstanding the provisions of the preceding sentence, if the owner or owners upon whom eligibility was based relinquish ownership or control of such concern, or enter into any agreement to relinquish such ownership or control, such contract or option shall be terminated for the convenience of the government, except that no repurchase costs or other damages may be assessed against such concern due solely to the provisions of this subparagraph.

(B) The Administrator may, as a matter of discretion and on a nondelegable basis, waive the requirements of subparagraph (A) if requested to do so prior to the actual relinquishment of ownership or control. In addition to the requirement of the preceding sentence, a waiver may only be given if one or more of the following conditions exist:

(i) Exceptional circumstances evidence a manifest hardship on such socially and economically disadvantaged individuals, and the failure to give a waiver would substantially harm the public interest.

(ii) When it is necessary for the owners of the concern to surrender partial control of such concern on a temporary basis in order to obtain equity financing.

(22)(A) An otherwise responsible business concern that is in compliance with the requirements of subparagraph (B) shall not be denied the opportunity to submit and have considered its offer for any procurement contract for the supply of a product to be let pursuant to this subsection or subsection (a) of section 15 solely because such concern is other than the actual manufacturer or processor of the product to be supplied under the contract.

(B) To be in compliance with the requirements referred to in subparagraph (A), such a business concern shall—

(i) be primarily engaged in the wholesale or retail trade;

(ii) be a regular dealer, as defined pursuant to section 35(a) of title 41, United States Code (popularly referred to as the Walsh-Healey Public Contracts Act), in the product to be offered the Government or be specifically exempted from such section by section 7(j)(12)(B); and

(iii) represent that it will supply the product of a domestic small business manufacturer or processor, except that, the Administrator may waive the application of this clause, as it pertains to the furnishing of a product manufactured or processed by a small business, for any class of products for which there are no small business manufacturers or processors participating in the Federal market.

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(d)(1) * * *

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(4)(A) * * *

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(E)*(i)* Notwithstanding any other provision of law, every Federal agency, in order to encourage subcontracting opportunities for small business concerns and small business concerns owned and controlled by the socially and economically disadvantaged individuals as defined in paragraph (3) of this subsection, is hereby authorized to provide such incentives as such Federal agency may deem appropriate in order to encourage such subcontracting opportunities as may be commensurate with the efficient and economical performance of the contract: *Provided,* That, this subparagraph shall apply only to contracts let pursuant to the negotiated method of procurement.

(ii) Every contract to be awarded after the effective date of this clause and that is subject to the requirements of paragraph (4) or (5), shall contain a provision providing for liquidated damages in the event that the prime contractor fails to comply in good faith with the clause contained in paragraph (3) or with any plan required of such contractor pursuant to the authority of this subsection. The awarding agency shall ensure, by reviewing the past performance of the apparent successful offeror or bidder, that such bidder or offeror has not offered goals that are unreasonably below its actual past performance.

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SEC. 10. (a) * * *

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(e)*(1)* The Administration *and the Inspector General of the Administration* shall retain all correspondence, records of inquiries, memoranada, reports, books, and records, including memoranda as to all investigations conducted by or for the Administration, for a period of at least one year from the date of each thereof, and shall at all times keep the same available for inspection and examination by the Senate Select Committee on Small Business and the Committee on Small Business of the House of Representatives or their duly authorized representatives.

(2)(A) The Committee on Small Business of either the Senate or the House of Representatives may request that the Inspector General of the Administration conduct an investigation of any program or activity conducted under the authority of sections 7(j) or 8(a) of this Act. No later than fifteen days after the receipt of such a request, the Inspector General shall inform the committee, in writing, of the estimated time needed to complete the investigation, or shall deny the request for good cause. If the committee's request is denied, the Inspector General shall provide the committee with a written and detailed explanation of the reasons for the denial within such fifteen-day period.

(B) The Office of the Inspector General shall keep the committee duly informed of the progress of any investigation conducted pursuant to subparagraph (A) and shall furnish such committee, in a timely manner, a detailed written report of its findings, conclusions, and recommendations.

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SEC. 15. (a) * * *

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(k) There is hereby established in each Federal agency having procurement powers an office to be known as the "Office of Small and Disadvantaged Business Utilization". The management of each such office shall be vested in an officer or employee of such agency who shall—

(1) * * *

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[(3) be responsible only to, and report directly to, the head of such agency or to his deputy, except that in the case of the Department of Defense the Director of the Office of Small and Disadvantaged Business Utilization shall be responsible to, and report directly to, the Under Secretary of Defense for Acquisition.]

(3) be responsible only to, and report directly to, the head of such agency or to the deputy of such head;

* * * * * * *

(6) assign a small business technical adviser to each office to which the Administration has assigned a procurement center representative—

(A) who shall be a full-time employee of the procuring activity and shall be well qualified, technically trained and familiar with the supplies or services purchased at the activity, and

(B) whose principal duty shall be to assist the Administration procurement center representative in his duties and functions relating to sections 8 and 15 of this Act, [and]

(7) cooperate, and consult on a regular basis, with the Administration with respect to carry out the functions and duties described in paragraph [4] of this subsection,[.] *and*

(8) make recommendations to contracting officers whether a particular contract requirement should be awarded pursuant to subsection (a), section 8(a) or section 1207 of Public Law 99-661. Such recommendations shall be made with due regard to the requirements of subsection (m) and the failure of the contracting officer to accept any such recommendations shall be documented and included within the appropriate contract file.

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[(m)(1) The President shall, not later than October 1, 1979, transmit to the Select Committee on Small Business and the Committee on Armed Services of the Senate and to the Committee on Small Business and the Committee on Armed Services of the House of Representatives a report on the labor surplus area procurement program under this section and the manpower policy described in subparagraph (D). Such report, together with recommendations, shall include, but not be limited to—

[(A) an analysis of the effectiveness of such labor surplus area procurement program, including its effectiveness in creating jobs in the areas of high unemployment and the method by which labor markets are classified and designated as labor surplus areas;

[(B) its potential benefits to Federal, State and local governments, including tax benefits, reductions in Federal payments to labor surplus areas, and reductions in State unemployment costs where such information is available;

[(C) its potential costs, including its impact on the efficient utilization of Federal resources, its effect on the local economy of non-labor surplus areas, its impact on small business concerns not in labor surplus areas to the extent such information is available, and its impact on contract costs to the Federal Government; and

[(D) with respect to the implementation by the Department of Defense of Defense Manpower Policy Number 4A (32A CFR Chapter 1) or any successor policy, in addition to the matters required by subparagraphs (A), (B), and (C), information concerning the impact on such matters of the expenditure of any funds which were available for procurement and which were not obligated for expenditure on September 30, 1977.]

(m)(1) Each agency subject to the requirements of section 1207 of Public Law 99-661, shall, when implementing such requirements—

(A) establish policies and procedures that insure that there will be no reduction in the current number or dollar value of contracts awarded pursuant to this section and section 8(a) in order to achieve any goal or other program objective; and

(B) implement such section 1207 in a manner that will not alter or change the procurement process used to implement this section or section 8(a).

(2) All procurement center representatives (including those referred to in subsection (k)(6)), in addition to such other duties as may be designated by the Administrator, shall—

(A) monitor the performance of the procurement activities to which they are assigned to ascertain the degree of compliance with the requirements of paragraph (1);

(B) report to their immediate supervisors all instances of noncompliance with such requirements; and

(C) increase, insofar as possible, the number and dollar value of procurements that may be used for the programs established under this section, section 8(a), and section 1207 of Public Law 99-661.

(3) A business concern shall not be considered other than a small business concern, for purposes of section 1207 of Public Law 99-661, solely because its receipts or number of employees exceed the applicable numerical size standard (established pursuant to section 3 of this Act) in effect as of October 1, 1987, unless such receipts or number of employees exceed such size standard by more than 25 per centum.

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[(o)(1) A concern may not be awarded a contract under this subsection as a small business concern unless the concern agrees that—

[(A) in case of a contract for services (except construction), at least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern; and

[(B) in the case of a contract for procurement of supplies (other than procurement from a regular dealer in such supplies), the concern will perform work for at least 50 percent of the cost of manufacturing the supplies (not including the cost of materials).

[(2) The Administrator may change the percentage under subparagraph (A) or (B) of paragraph (1) if the Administrator determines that such change is necessary to reflect conventional industry practices among business concerns that are below the numerical size standard for businesses in that industry category.

[(3) The Administration shall establish, through public rulemaking, requirements similar to those specified in paragraph (1) to be applicable to contracts for general and specialty construction and to contracts for any other industry category not otherwise subject to the requirements of such paragraph. The percentage applicable to any such requirement shall be determined in accordance with paragraph (2).]

(o)(1) A concern may not be awarded a contract under subsection (a) as a small business concern unless the concern agrees that—

(A) in the case of a contract for services (except construction), at least 50 per centum of the cost of contract performance incurred for personnel shall be expended for employees of the concern; and

(B) in the case of a contract for procurement of supplies (other than procurement form a regular dealer in such supplies), the concern will perform work for at least 50 per centum of the cost of manufacturing the supplies (not including the cost of materials).

(2) The Administrator may change the percentage under subparagraph (A) or (B) of paragraph (1) if the Administrator determines that such change is necessary to reflect conventional industry practices among business concerns that are below the numerical size standard for businesses in that industry category.

(3) The Administration shall establish, through public rulemaking, requirements similar to those specified in paragraph (1) to be applicable to contracts for general and specialty construction and to contracts for any other industry category not otherwise subject to the requirements of such subparagraph. The percentage applicable to any such requirement shall be determined in accordance with paragraph (2).

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SEC. 16. (a) * * *

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(d) Whoever misrepresents the status of any concern or person as a "small business concern" or "small business concern owned and controlled by socially and economically disadvantaged individuals," in order to obtain for oneself or another any—

(1) prime contract to be awarded pursuant to section 9 or 15;

(2) subcontract to be awarded pursuant to section 8(a);

(3) subcontract that is to be included as part or all of a goal contained in a subcontracting plan required pursuant to section 8(d); or

(4) prime or subcontract to be awarded as a result, or in furtherance, of any other provision of Federal law that specifically references section 8(d) for a definition of program eligibility.

shall be punished by a fine of not more than [$50,000] *$500,000* or by imprisonment for not more than [five] *ten* years, or both.

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ACT OF OCTOBER 21, 1980

To amend the Small Business Act, to provide for the payment of the United States of certain fees and costs incurred by prevailing parties in Federal agency adjudications and in civil actions in courts of the United States, and for other purposes

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[SEC. 106. (a) Section 7(j)(10)(A)(i) of the Small Business Act is amended by striking the semicolon at the end thereof and inserting in lieu thereof "for correcting the impairment of such concern's ability to compete, as determined for such concern pursuant to section 8(a)(6) of this Act, within a fixed period of time as mutually agreed upon by the applicant and the Administrator prior to acceptance in such program: *Provided,* That not less than one year prior to the expiration of such period, and upon the request of such

concern, the Administration shall review such period and may extend such period as necessary and appropriate: *Provided further,* That no determination made under this paragraph shall be considered a denial of total participation for the purposes of section 8(a)(9) of this Act;".

[(b) Notwithstanding the provisions of subsection (a) of this section, for concerns eligible to receive contracts pursuant to section 8(a) of the Small Business Act on the effective date of the amendment made by this section, each such concern shall submit to the Small Business Administration within two months after the promulgation of final regulations issued within one hundred and twenty days after the enactment of this Act the business plan required under section 7(j)(10)(A)(i) of the Small Business Act, as amended by subsection (a) of this section: *Provided however,* That the period of time required under section 7(j)(10)(A)(i) of the Small Business Act, as amended by subsection (a) of this section, shall be fixed as mutually agreed upon by the program participant and the Small Business Administration prior to the awarding or extending of contracts to such concern pursuant to section 8(a) of the Small Business Act after June 1, 1981, but the period shall be fixed in no case later than eighteen months after the effective date of this Act: *Provided further,* That no determination made under this paragraph shall be considered a denial of total participation for the purposes of section 8(a)(9) of the Small Business Act.]

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